

Cour d'Appel

Montréal

En appel de la décision rendue le 26 juillet 1991 par
l'honorable juge [REDACTED] par
distribution [REDACTED]

Nos: [REDACTED]

LE PROCUREUR GÉNÉRAL DU CANADA
APPELANT-Intimé

c.

RJR-MacDONALD INC.
INTIMÉE-Requérante

-et-

Nos: 986-85-001237-920-01234

LE PROCUREUR GÉNÉRAL DU CANADA
APPELANT-Intimé

c.

IMPERIAL TOBACCO LTD
INTIMÉE-Requérante

-et-

LE PROCUREUR GÉNÉRAL DU QUÉBEC
MIS EN CAUSE-Mis en cause

DOSSIER CONJOINT

Volume XLVI: pages 8890 à 9101
(Dépositions)

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Le 2 avril 1990 (Suite)

In the year of Our Lord nineteen hundred and ninety (1990),
on this second (2nd) day of the month of April, PERSONALLY
CAME AND APPEARED:

5 RICHARD W. POLLAY,

WHO, having previously been duly sworn, doth depose and say
as follows:

10 CROSS-EXAMINATION BY Me COLIN K. IRVING (Contd)

on behalf of Petitioner, RJR-Macdonald Inc.

Q- Dr. Pollay, would you look at page twenty-four (24) of
your report, please? In the middle paragraph, the
second sentence refers to a document which you quote as
15 follows:

"Export's masculine, rugged image needs to be
placed in a more social/socially acceptable
context, communicating that it's all right to
smoke, especially Export."

20 And then you refer to a document.

Now, I'd like you to look at that document, please.
It is clear on the face of the document, is it not,
Doctor, that this comes from McCann-Erickson Advertising
of Canada Limited?

25 A- Yes, it is.

Q- If you look at page o six nine five (0695), do you find the quotation which I read to you from your report?

A- Yes, I do.

Q- Do you see it there, Doctor?

5 A- Yes.

Q- Yes. You have taken your quote from the middle of a sentence, have you not?

A- Yes, I have.

Q- Although your report doesn't indicate that it's taken
10 from the middle of a sentence, does it?

A- That's correct. There should be three ellipses between the quotation mark and Export.

Q- The part you left out reads:

15 "However, to maintain our current franchise
and attract lapsed users and Player's smokers,
Export's masculine, rugged image and so on."

Am I reading it correctly?

A- That's right. And the "however" is in juxtaposition to the paragraph above which says that Export should
20 continue to appeal to younger males. I assume that means younger and there's a misspelling.

Q- Yes, there is. So the purpose for which Export's rugged image needs to be placed in a more acceptable context and whatnot is to be found in the opening lines of that
25 sentence, which you omitted from your quotation?

- A- Yes, it appears to be to reassure the current smokers of the brand that is the current franchise.
- Q- M'hm. And attract lapsed users -- that's former users, isn't it?
- 5 A- That's correct. I didn't know whether that's switchers or quitters.
- Q- But they're all smokers, aren't they?
- A- Well, I don't know whether they're switchers or quitters. Lapsed users might be non-smokers.
- 10 Q- Well, lapsed is former users. Lapsed users means people who used to use the brand, doesn't it?
- A- Yes, but I don't know whether they've quit smoking entirely or just quit the brand.
- Q- Could we have that produced, please, as RJR-175.
- 15 Would you look at page twenty-five (25) of your report, please?
- You refer at the bottom of that page to evaluation research carried out by RJR-MI after the launch of Tempo. That's all?
- 20 A- Yes.
- Q- Yes. The document from which you quote is the Tempo qualitative post-launch evaluation? Yes? I think you'll see that on the second and third line of the last paragraph on the page.
- 25 A- Is that a question?

Q- Yes. I say you're quoting from the Tempo qualitative post-launch evaluation, were you not?

A- Yes, that's the citation.

Q- Okay. I'd like to put that document in front of you,
and it is Exhibit AG-17, Mr. Mitchell tells me.

We have an extra copy here, Mr. Baker.

May I take it, Dr. Pollay, that you had read that document before you selected the quotations from it which I find in your report?

10 A- Yes, I read the bulk of it.

Q- M'hm. Would you look at page sixty-two seventy-seven (6277). There's a heading there: "Methodology." Do you recall reading that?

A- No, not specifically, but I'm reading it now.

15 Q- I want to draw your attention in particular to the heading: "Respondents," about a third of the way down, where it says:

"Respondents had the following characteristics:

20 1. All smoked at least 1 cigarette a
day.

2. All had smoked their regular brand for less than 3 years, off-setting the possibility of strong brand loyalty that might

prevent trial of new brands of
cigarettes."

Now, having refreshed your mind, Dr. Pollay, do you
recall having seen that before?

5 A- I don't have a specific recall, but I see it now.

Q- M'hm. Do you -- in looking at it again now, does it
trigger your memory that there is something like that
describing the Respondents as being smokers in all of
the qualitative or quantitative research which you
10 looked at which came from RJR-MI? Isn't that typical of
all of them?

A- No, I can't speak to the typicality. That certainly is
evidence here in this particular study.

Q- Now, may we look at page sixty-two eighty-one (6281) of
15 the same document; and comparing that to page
twenty-five (25) of your report, could you confirm,
first of all, that the quotation in the last paragraph
on page twenty-five (25) comes from page six two eight
one (6281) of AG-17, under the heading: Current
20 Attitudes to Smoking.

A- Yes.

Q- So, your quotation starts with the second sentence of
that paragraph?

A- Yes, I quote the bulk of those four (4) paragraphs under
25 that section.

Q- Now, the bulk, but not all, do you?

A- No.

Q- No. So let's just go through it and see what's in and what's not in, Doctor. I'm reading from your report:

5 "The present anti-smoking climate has made smokers defensive about smoking, both to themselves and others."

A- I missed -- it should say "to others".

Q- Yes.

10 "This is a result of a preference for smoking to be a relaxing understated activity which makes the smoker inconspicuous and less prone to social censure ..."

And then you jump over the next sentence, I take it, and go to:

15

"These attitudes result in smokers requiring some reassurance, about both the social acceptability of smoking and smoking a particular brand."

20 And then you leave out the words: "and the value of trying a new brand."

A- Yes.

Q- Yes. We were talking here of a new brand, weren't we?

A- Yes. And smoking a particular brand.

25 Q- Uh, huh. The Tempo was a new brand, wasn't it?

A- Yes. In test market at that stage.

Q- Then you go on, in the next paragraph:

"Tempo's advertising does not seem to have
given this support."

5 And then there's a comment about the ads, isn't there?

"(The people are not smoking and are not in
social situations where smoking takes place.)"

You omitted that?

A- Yes, I left out the parenthetical expression.

10 Q- And where does it continue from AG-17, Doctor?

A- On page eight (8), about two-thirds (2/3) of the way
down.

Me BAKER:

15 Just for the record, page eight (8) is six two eight two
(6282).

A- Page eight (8) is the original six two eight two (6282).

Me IRVING:

20 Q- All right. So that in your report, when we go from the
bottom of page twenty-five (25), underneath the words
"this support". I'm sorry. Strike that altogether.

Just looking at page twenty-six (26), when we go
from the words:

"... make it a little uncomfortable for
smokers ... "

25 -- to the next line of your quote:

"Tempo's advertising is seen as ... "

-- we're going from page six two eight one (6281) of the exhibit to page six two eight two (6282) at the bottom of the exhibit -- is that right?

5 A- That's correct.

Q- Yes. Now, at the bottom of page six two eight two (6282) I read, from both the exhibit and your report:

10 "Tempo's advertising is seen as a) highly intrusive, e.g. all over the place, highly colorful, pushy, which maybe too visible for comfort ..."

-- and you've quoted all of that, haven't you?

A- Uh, huh.

Q- "... b) ..."

15 -- reading from your report:

"... youth-oriented, e.g. for teenagers, people under 25 (new smokers) ..."

Would you read the words which follow in that very sentence?

20 A- "... which either produces rejection of or a tendency to dissociate oneself from the brand."

Q- I see.

A- I mean, the entire context of this discussion, of
25 course, is explaining the failure of the brand, the

reason for its rejection by the market.

Q- Yes, the brand was an utter failure, wasn't it?

A- I don't recall the exact data, but it wasn't sufficiently successful to go national with it.

5 Q- But let's come back to that subparagraph b) again, for a second, Doctor. If I were to read your quote, all I would see is that somebody thought that the advertising was youth-oriented. But the report says that the fact that it is youth-oriented produces rejection of or a
10 tendency to dissociate oneself from the brand. Didn't you think that was significant enough to include in your quotation?

A- I think it is included. Well, I mean, the entire context of the quotation is explained in the rejection
15 of the brand.

Q- I see. Point out to me where I find that in your report, would you please?

A- Well, the very last line says:

"Put briefly, it seems that Tempo's
20 advertising was too trendy and heavy-handed in its style and deployment."

Q- What the report says is that:

"Its appearance as youth-oriented produced a rejection of or a tendency to dissociate
25 oneself from the brand."

Are you telling me that that last sentence you just read to me is intended to convey that thought -- too trendy and heavy-handed.

A- Yes.

5 Q- What has that got to do with youth-oriented, Doctor?

A- Well, maybe I was too succinct, but I do think that the fact of the rejection of the brand and the attribution of the advertising as -- what was responsible is made clear in my statement, as it is in this report.

10 Q- But what is not made clear, is it, is that the fact of it being youth-oriented tended to produce rejection? Is it? Take your time. Re-read ...

A- I guess not -- I guess not clear to you. That's seems to be the case.

15 Q- Do you think it would be clear to anybody, Doctor?

A- It seems clear to me that the delineation of reasons as to its rejections are a) highly intrusive, b) youth-oriented, c) lacking identity with the target groups.

20 Q- But you will agree with me that the conclusion they reached, that that fact of being youth-oriented itself produced a rejection, is nowhere to be found on what you have written for the Court?

A- No, I do not agree with that.

25 Q- I see.

A- I may not have articulated it to your satisfaction, but I think that is the context and would be the understanding.

5 Q- I see. So you thought it was clear enough from what you did quote that it would be just as well to leave off the rest of it, did you?

A- I repeat, the attribution of responsibility for the failure of the brand seems to be Tempo's advertising, and the specifics are that it was too intrusive, too youth-oriented and too lacking in identity with the target groups A, B and C, which I note here are the A, B and C listed here. There are more reasons. I didn't carry on. I think that captures the gist of the rejection.

15 Q- All right. Would you turn to just the bottom of page twenty-seven (27) and the top of page twenty-eight (28) of your report, Dr. Pollay.

20 At the very bottom of the page you refer to something you call the twenty-five (25) paged Vantage usage and attitude study of nineteen eighty-three (1983).

A- I noted -- my copy says two hundred and seventy-five (275) paged.

Q- Yes. I'm sorry? Your copy...

25 A- I said, my copy says two hundred and seventy-five (275)

paged Vantage...

Q- Yes. I'm sorry. Is that not what I said?

A- I thought you said twenty-five (25).

Q- No, no, two hundred and seventy-five (275) pages.

5 And you go on to say that that study, and I'm
quoting you now, noted that some smokers do not feel
comfortable at all about smoking and perhaps even
harbored some guilt over the fact that they smoked. Do
you see that?

10 A- Yes, I do.

Q- Were you intending by that to paraphrase what was found
in the report, Dr. Pollay, at the page you give?

A- I'm not sure there's a parallel phrase that's a little
paraphrased, but that's the idea I found in that report.

15 Q- Well, I'm going to show you the report.

My Lord, I don't propose to produce all of this.
Dr. Pollay's correct when he says it's two hundred and
seventy-five (275) pages long.

20 But I'd like you to look at the whole document
first, just to be sure you have the right document and
then look at page thirty-five eighty-five (3585).

My Lord, I'll give you the whole document in the
meantime, but...

25 Would you just look at the last paragraph on page
thirty-five eighty-five (3585), Dr. Pollay.

Me BAKER:

Hold on for just a split second, please. Some of mine aren't marked.

THE COURT:

5 They're probably upside down.

Me BAKER:

Yes. Hold on for just a moment. I want to match it.

Me IRVING:

Q- Do you have it?

10 A- Yes, I do.

Q- In reading that last paragraph, Dr. Pollay, is that not the source of the statement I just read to you from page twenty-eight (28) of your report?

A- Yes, it is.

15 Q- What the actual document says is this, isn't it?

"One might further speculate that this market segment does not feel all that comfortable about smoking and perhaps even harbors some guilt over the fact that they smoke."

20 Do you see that?

A- Yes.

Q- Why did you change it to read -- well, why did you change it by deleting the, "one might further speculate," and then change the words, "do not feel all
25 that comfortable," into "do not feel comfortable at

all?"

A- I can't speak to that. I had taken some notes and maybe
in my copying over the notes that I erred. I was not
intending to quote it verbatim. I thought I was
5 expressing it in my words, although I do note that it is
substantially the words from the text.

Q- M'hm. And "do not feel all that comfortable" and "do
not feel comfortable at all," are two (2) quite
different thoughts aren't they?

10 A- Well, I suppose it speaks to the degree of discomfort,
but there certainly is discomfort in either case.

Q- The text speaks of a market segment. What is that
segment, Doctor?

A- It's identified as segment six (6)/seven (7).

15 Q- Which is what?

A- I don't know. We would have to refer to other pages in
the document.

Q- I see. It also refers to segment two (2)/three (3)
smokers. What's that?

20 A- We again should refer to, for precision, to other pages
in the document where those are defined.

Q- Your answer to the Court is you don't know, without
looking at the document, is that it?

Me BAKER:

25 Well, then, look at the document. It's been a long

time.

Me IRVING:

Well, I'm just asking if he knows.

Q- Do you know, Doctor, what it means?

5 A- No, I wouldn't feel comfortable with enough precision to speak to it.

Q- Yes.

A- There were three (3) segmentation studies, and I don't remember which these numbers refer to, whether it's to
10 tobaccographics or psychographics or product user imagery studies.

Q- Will you look at page thirty-one (31) of your report for a moment? You deal there with Vantage ads. Did you read any of the evidence which was given in this case by
15 representatives of RJR-Macdonald about the Vantage campaign in the late nineteen seventies (1970s) and the cancellation of that campaign?

A- I don't recall that.

Q- Did you read any of the evidence in this case?

20 A- Yes, I had access to some of the transcripts.

Q- M'hm. Did you read Mr. Peter Hoult's transcript by any chance?

A- I read some of it. I don't recall the discussion of Vantage.

25 Q- M'hm. At the end of the first paragraph on page

thirty-one (31) you say this:

"Other ads were more successful at communicating health without making explicit health claims. Another ad, using the phrase 'smoke smart' was perceived to mean better for you and safe."

Do you see that, Dr. Pollay?

A- Yes, I do.

Q- Am I to take it that it's your evidence to this Court that there was an advertising campaign using the phrase: "smoke smart?"

A- I don't know whether there was a campaign. There was at least an individual execution that included that phrase: "smoke smart."

Q- Did you look at the ad: "smoke smart?"

A- Yes, I have seen that ad.

Q- Have you got it with you?

A- No, I do not.

Q- Would you be surprised to know there never was an ad campaign using the phrase "smoke smart," Dr. Pollay?

A- I'd be very surprised.

Q- I see.

A- I'd be stunned. I have seen such an ad.

Q- But I would like you, please, to make me an undertaking then to get me a copy of the ad so that you may bring it

to the Court.

A- I'll be glad to do so.

Q- Thank you. In reading Mr. Hoult's evidence you didn't happen to find the passage where he was asked to double-check and see about it and told the Court that no such campaign was ever run?

A- I have in my archival collection a sample of that ad that was -- you claim never run.

Q- I wait with great interest to see it, Dr. Pollay.

10 The fact is, all kinds of ad campaigns are
suggested by agencies which never run, isn't that so?

A- But they don't show up in my archives except as they're clearly defined by coming from corporate donations.

15 Q- M'hm. But the fact is, is it not, that many many ads
are suggested by advertising agencies which, for one
reason or another, never see the light of day?

A- Yes, that's correct.

Q- There've been some quite famous examples of that,
haven't there, which you as a historian would have
20 followed?

A- Well, it's hard to follow events that are not public.

Q- Some aren't.

THE COURT:

Are you filing the page which you referred to?

Me IRVING:

Oh, yes, My Lord, I should. May I have that page.

THE COURT:

Or...

5 Me IRVING:

I would propose only to file the page, but...

THE COURT:

...file the whole thing.

Me IRVING:

10 ...my friends want to file the whole document I don't
mind.

Me BAKER:

For the moment, I want to examine this document at some
point this afternoon, so I think...

15 Me IRVING:

Well, why don't we give it a number now and we can
decide later if it's going to be just the page or the
whole document.

Me BAKER:

20 Yes.

THE COURT:

The witness, anyways, has used it, so.

Me IRVING:

Yes.

25

THE COURT:

Why don't you give it a number altogether.

Me IRVING:

Well, we'll give it a number now, and it will be

5 RJR-176. If Mr. Baker agrees later, we'll restrict it
to a page.

THE COURT:

Okay. Just a second.

Me IRVING:

10 Q- I'd like you to look at Exhibit AG-119A, Dr. Pollay, for
a minute.

THE COURT:

AG-1?

Me IRVING:

15 AG-119A.

THE COURT:

A.

Me IRVING:

It's the FTC staff report on cigarette advertising
20 investigation. The confidential one. 119A.

Me BAKER:

Have you got a copy for the...

Me IRVING:

Yes, I have a copy. Well, I have my own copy.

25 I'll show him this if you like?

Me BAKER:

No, I was just suggesting for my friend that the copy we have that we're placing before the witness is a photocopy of a photocopy and it's very difficult to read it.

THE COURT:

Can you read, or I can give him my copy.

Me BAKER:

Well, we'll let him go for the moment. If you have difficulty, Dr. Pollay, don't leave the difficulty unknown.

Me IRVING:

Q- What I'd like to look at with you, Dr. Pollay, is to be found at page two dash seventeen (2-17) and two dash eighteen (2-18).

A- Yes, I have those pages.

Q- You have those pages? Now, in looking at the bottom of two seventeen (2-17), you'll see the sentence:

"The chapter then recommends a strategy for attracting young 'starters' to cigarette smokers."

And then there is the strategy on page two eighteen (2-18), which I won't read out. Do you see that?

A- Yes, I do.

Q- Now, as an advertising historian, Dr. Pollay, with a

good deal of interest in the cigarette industry in particular, are you familiar with this particular story, the story of the proposal to Brown and Williamson by Bates, the advertising agency?

5 A- Only through this document. I had seen this document in the course of preparation for the Cipollone trial.

Q- M'hm. And did you inform yourself at all, Dr. Pollay, about what happened after Bates made this proposal to Brown and Williamson?

10 A- I know Brown and Williamson denies utilization of the recommendation.

Q- Yes. And do you know also that Bates was fired as their agency as a result of making this proposal?

A- I don't know that it was as a result of this proposal, I
15 do know that the Bates Agency -- or that the account changed hands.

Q- Yes.

A- Accounts change hands very rapidly in the business, so it's hard to follow specific events for that.

20 Q- And as a historian, and with a great interest in the subject, did you follow the subsequent trial involving CBS which publicized this and was then sued for libel by Brown and Williamson and was condemned to pay very substantial damages for having publicized this
25 suggestion as being related in any way to Brown and

Williamson. Do you recall that?

A- I don't recall CBS. I do recall that there was a radio commentator who was sued over the matter.

Q- Yes, and you recall...

5 A- I think it was his comments.

Q- And you recall that judgment was given for very substantial damages on the ground that this was deliberate falsehood? Do you remember that?

10 A- I don't -- I didn't read the judgment so I don't know the grounds.

Q- I see.

A- I do know the damages were considerable. They were five million dollars (\$5,000,000) or something like that.

15 Q- There were punitive damages for deliberate wrongdoing, were they not?

A- That I don't know. As I say, I don't recall every -- I've never seen the judgment itself.

20 Q- But you do recall that very substantial damages were awarded against the media which broadcast that particular accusation?

A- My understanding of it was it was against the commentator and that it included the nature of his comments as well as the presentation of the facts as they had been documented by the FTC.

25 Q- You gave evidence on Friday, Dr. Pollay...

Before I go on, Dr. Pollay, in looking for the smoke smart campaign, if I didn't make it clear already, I'm asking you whether it is not a fact that no such campaign was ever run in this country by RJR-Macdonald, the party to this case?

5

A- Well, with your qualification maybe you've learned something that I don't know. All I know is that I have an ad in my collection for Vantage, featuring the Vantage bulls-eye with the headline that says: "smoke smart."

10

Q- But you have no -- all right.

A- And I would assume that that's the ad in test here.

Q- But you have no knowledge of whether any such campaign was ever run in this country?

15

A- I'll have to look at the ad and we can see whether it has the U.S. or the Canadian warning on it. Since the U.S. design is generally different from the Canadian design, I think the bulls-eye is not used in the U.S., although maybe it was back then.

20

Q- Now, I'm going to ask you about some evidence you gave on Friday, Dr. Pollay, where you talked about advertising to promote brand switching. Do you recall giving that evidence?

A- Well, I could, if you could be more specific, I could --

25

I do remember that the topic came up about the relative

importance of switching compared to other strategic objectives.

Q- You said, at page eighty-two ninety-eight (8298)...

Me BAKER:

5 Hold on for just a moment, please.

Me IRVING:

... in answer to the following question from Mr. Baker:

"Q. Now, you know, Dr. Pollay, that the tobacco companies say that one of the primary
10 reasons for their advertising is to get brand switchers. Now, as a marketing analyst, what is your view of that concept?"

And you say:

"I find it quite hard to believe that the
15 brand switchers should be and was the primary focus of management attention."

Do you see that?

A- Yes, I do.

Q- Would you look at page sixteen (16) of your expert
20 report, please. Is it not a fact, Dr. Pollay, that brand advertising has two (2) purposes, one of which relates to brand switching, but the maintenance of brand loyalty has always been considered to be a major feature of such advertising?

25 A- The importance of the advertising to maintain brand

loyalty depends upon the degree of concern and threatened quitting that's evidenced there. But, for sure, advertising has, as one of its functions, the reassurance of present smokers.

5 Q- Uh, huh. And that's ...

A- Or present brand users in any product category.

Q- That's right. And that's reflected, is it not, in the quotation at page sixteen (16) of your report, from the RJR-MI Annual Business Plan, which I quote:

10 "The primary objective is to maintain current brand users."

Do you see that?

A- Yes, but it's not clear whether the maintenance is there, whether the option is switching to another brand or quitting. And considering, if they talk about switchers later on, it's all the more unclear.

15 Q- Now, if you have the transcript still in front of you, I would like you to look at page eighty-two sixty-seven (8267) for a moment.

20 THE COURT:

Eighty-two ...

Me IRVING:

25 Eighty-two sixty-seven (8267), My Lord. I'm sorry, it starts at eighty-two sixty-seven (8267), at the bottom of the page, where you say this, Dr. Pollay:

5 "In order to understand the history of
advertising, one has to also understand the
sort of social history of the society. That
is, how the society has changed, how its norms
and values have changed, because sometimes
such simple things as fashions and styles have
changed how people's tastes have changed."

Do you see all that?

A- Yes.

10 Q- You have, have you not, done a historical section in the
report which you've filed with the Court?

A- Yes, I have.

Q- Which begins at page five (5) of that report.

A- Yes.

15 Q- Do I have it correctly, that's the section which begins
at page five (5)?

A- Yes.

Q- There's a heading, The Importance of Advertising, which
begins at page five (5) and runs through to page seven
20 (7), and then you deal with the female segment beginning
at page seven (7) -- page eight (8) -- correct?

A- Yes.

Q- Uh, huh. Now, just in glancing through the first part
of that header, The Importance of Advertising, between
25 pages five (5) and seven (7), Dr. Pollay, is there, am I

missing any reference to changing social conditions in the period in which you're discussing? Is there any?

A- Well, there are references to changing technologies and the phenomena like the emergence of big band music and the like, but, no, that discussion is quite sparse, because my attempt here was to summarize in a very few pages that which I had carefully documented in about a hundred (100) page compendium of chronological notes. It wasn't meant to be an exhaustive historical treatment.

Q- Would you not agree, Dr. Pollay, that if one was reading this document without knowledge of any other factors, you would conclude, from what you say here, that the growth in cigarette usage in the United States, at least, in the period you're covering, was due to advertising, and nothing else?

A- It is my opinion that the rate of growth is attributable very much to advertising, and was, as we talked about before, attributed by most people to advertising. That's not to say that there wouldn't have been some growth in the absence of advertising, or that there weren't favorable social conditions like the Suffragette movement, the employment of women during the Second World War, and other such events that might have also fostered the rate of consumption among women.

So I would not attribute a hundred percent (100%) of the growth to that, to just advertising, but I do believe it was instrumental in the timing and pace of the growth.

5 Q- In fact, Dr. Pollay, from the turn of the century to about nineteen forty (1940), it is a fact, is it not, that there was no growth in per capita use of tobacco, but there was simply a switch from one form to another?

10 A- That I do not know. I do know that the popularity of cigarettes -- or cigarettes first became the most popular form of consumption in the United States in about nineteen twenty-one (1921).

Q- You quote a book by Mr. Michael Schudson in your report. The book is called "Advertising, The Uneasy Persuasion."

15 Have you read that book?

A. Yes, I have.

Q- Yes. And did you not notice in reading Schudson...

A- Where is my -- where do I quote that?

20 Q- I'll find it for you, if you like, and refer to it at least.

THE COURT:

What's the name?

A- Oh, yes, I have it.

Me BAKER:

25 What page? Schudson.

Me IRVING:

You'll just find it in your report -- Schudson.

Me BAKER:

Where is it, Dr. Pollay, in the report?

5 Me IRVING:

On page eight (8).

A- Yes.

Q- Could we read you from page one hundred and eighty-four
(184) of Mr. Schudson's book, Dr. Pollay.

10 THE COURT:

Where is that? I don't see the reference.

Me IRVING:

At page eight (8) of the expert report, near the top, My
Lord, there's a reference to ...

15 THE COURT:

Oh, Schudson, okay.

Me IRVING:

... Schudson, eighty-four (84).

Q- Dr. Pollay, just so that we may be clear on it, your
20 reference there is to the book "Advertising, The Uneasy
Persuasion"...

A- The Uneasy Persuasion.

Q- ... by Michael Schudson.

A- Yes -- subtitled: Its Dubious Impact on American
25 Society. As you know, Mr. Schudson, Professor Schudson,

Dr. Schudson, is a sociologist from California.

Q- And he says at page one eighty-four (184) of the book,
quote:

"While cigarette consumption grew enormously
during the years between the wars, total
tobacco consumption remained stable. In 1918,
the total tobacco consumption (cigarettes,
cigars, pipe tobacco, chewing tobacco, and
snuff) was exactly the same as it would be 22
years later, in 1940, 9.12 lbs. per adult."

Do you recall having read that before?

A- No, I don't recall that specific passage, and I'd be
surprised if it was also held true to women. I don't
think they were much of a consumer of pipes and snuff in
the early days.

Q- No. No, I agree with you, Dr. Pollay, they weren't.
But, in fact, it wasn't until nineteen forty (1940) and
the Second World War, and the huge influx of women into
manufacturing, that women really began to smoke in large
numbers, was it?

A- No, I believe the smoking among women began in the
nineteen twenties (1920s). In fact, you don't get the
major advertising campaigns focused on women until the
latter nineteen twenties (1920s)...

Q- Uh, huh.

A- ... and there has to some critical mass of women smoking before you could design to do that.

Q- I quite agree with you, Dr. Pollay. We're going to come to that, in fact. But is it not a fact widely reported -- in fact, by some people as eminent as Dr. Harris -- that the real influx of women, in very large numbers, came at the time of the Second World War. Is that not to your knowledge? I know women smoked in the nineteen twenties (1920s) and before, but in big numbers -- it was the Second War, wasn't it?

A- Well, there may have been a growth in the Second World War. I already mentioned that the influx of women into the work force would have been a social factor supporting their smoking. But smoking among women had been growing during the thirties (30s) and had been the subject of substantial managerial effort.

Q- So, if Mr. Schudson is correct, what we have really seen in the period between the two (2) world wars is simply a major switch from one form of tobacco use to another. Isn't that so?

A- It may be true for men. As I say, I doubt that it's true for women. I ...

Q- We're going to ...

A- ... it's hard to imagine them smoking -- or consuming alternative forms of tobacco.

Q- Now, I would like to deal with some of the other factors, Doctor Pollay, which would have had an impact on the rise in use of cigarettes in the early part of this century. May I have the book back, please. Is it not a fact, Dr. Pollay, that urbanization is one of the factors affecting the increase in cigarette consumption?

A- Well, I don't know the extent to which urbanization is a factor, the magnitude, the import of that. But I would agree that it probably is a contributing factor.

Q- Would you agree that in the United States, which is the period -- or I'm sorry -- the country referred to in your historical analysis, there was a very marked shift in population from rural to urban areas in the period nineteen hundred (1900), say, to nineteen twenty-five (1925)?

A- Yes. It's my belief that the reason urbanization contributes to change in smoking rates is related to the movement to the cities and the break-up of extended families, so that young people are on their own and able to do things, perhaps in violation of family norms.

Q- But the fact is: smoking prevalence is greater in urban areas than in rural areas, is that not so?

A- Again, I'm not certain of the extent of that.

Q- You don't know?

A- Even to this day, I'm not certain of the extent of that.

Q- M'hm. If it turned out that that was true, prevalence is higher in urban areas, then the very marked urbanization of America in the early part of this century would have had an effect on cigarette smoking, would it not?

A- The magnitude of that effect would depend upon the magnitude of difference between urban and rural smoking patterns.

Q- Was there not also a trend towards greater
10 industrialization in the United States in the period
we're considering?

A- I'm not sure what you mean by industrialization? Do you mean a higher fraction of the labour force working in factories?

15	O- Yes.
----	---------

A- And things like that?

Yes, I would guess so.

Q- And that has an impact on cigarette smoking also, doesn't it?

20 A- Again, I'm not certain as to its magnitude or
significance.

Q- Without looking at statistics, Doctor, if you had a rural population which was using tobacco in other forms: pipes, cigars, and you found that the demographic trends pushed more and more and more of these people away from

the farm and more and more and more into industry, with all the pressures that go with it; would you be surprised to find that they started using cigarettes, which are much more convenient, in far greater numbers than they used to?

A- Well, again, I can't speak to the magnitude, so I don't know about the far greater numbers. But I guess I would accept that if there were to be a difference that the convenience of the form of nicotine packaging in the cigarette would make it a more popular form. It's hard to spit in the city. It's easier in the country.

Q- That's right. And economic events would affect cigarette consumption also, would they not?

A- It doesn't have much of an impact.

Q- No.

A- That is, as an industry group it's generally thought to be relatively recession-proof. That is, employment -- unemployment rates don't seem to be devastating to the industry.

Q- Is it not a fact that cigarette consumption fell during the Great Depression, Dr. Pollay?

A- My belief is that there was only a temporary period when sales fell, that for the most part sales grew, continuing throughout the thirties (30s).

Q- During the...

A- It was only a year or so when it fell.

Q- Right. And as the price of cigarettes fell, wouldn't consumption tend to go up?

A- Yes.

5 Q- M'hm.

A- Especially among starter smokers. Once people are confirmed smokers, I think they become relatively price inelastic. That is, they're inclined to continue smoking even if somewhat more expensive. But starters might well be affected by the pricing.

10

Q- Now, just looking at those three (3) factors we've just been going through: industrialization, urbanization and economic factors, can you point out to me where any one of those is mentioned anywhere in your report?

15

A- No, they're not. As I say, I tried to provide a summary view that encapsulated what I had learned through my other collection of chronological notes.

Q- In fact, it encapsulates the idea that it's all due to advertising, isn't that so, Doctor?

20

A- No, I don't believe I say it's all due to advertising.

Q- M'hm. You quote George Washington Hill?

A- Yes.

Q- You quote Printers' Ink?

A- Yes.

25

Q- You quote Weld? They all say the same thing, don't

they?

5 A- They all say that advertising played a significant role. I don't know that any of them said that advertising was the only thing going on. I mean they may be taking advantage of desirable circumstances, but that the growth rate and the timing of the growth, they felt was attributable to advertising.

Q- Did you, by any chance, read or refer to the evidence of Dr. Roberta Ferrence in this case, Dr. Pollay?

10 A- The only Ferrence piece I've seen is the one I cite.

Q- M'hm. Were you referred to, have you read, any of the evidence of Sir Richard Doll on the effects of the First and Second War on cigarette smoking prevalence in the United Kingdom?

15 A- No, I have not. I do know that smoking in the U.S. grew in popularity in both wars. There were a couple of reasons for that. There were complimentary cigarettes given away to soldiers and the import of that is not only to help build the market, but after the First World War the returning soldiers helped redefine the nature of smokers. Before that smoking had been more constrained to the urban elites and afterwards now it was perceived, somewhat correctly, that the young men who had been the heros of the First World War were cigarette smokers. So
20 I think the social perception of cigarette smoking
25

changed subsequent to the First World War.

Q- And cigarettes were provided as part of the rations not only in the United States but in Britain and Canada as well, weren't they?

5 A- Yes. I believe so. And I know that for a fact in the U.S.

Q- As a historian, Dr. Pollay, you're not unaware of the numerous comments that have been made to the effect that it really was the First War and the Second War that made
10 cigarette smoking an almost universal craze?

A- No, and...

Q- No?

A- ... I think that would be misstatement if people said it that way. I mean to say, they might provide the
15 circumstances, but it's the sampling -- in that case the sampling activity or in other cases the advertising activity that capitalizes on those circumstances.

Q- Did you happen to read John Gunther's "Taken At the Flood," the story of Albert Lasker?

20 A- Yes, although some time ago.

Q- He said it was World War I which made manufactured cigarettes a universal craze, do you recall that?

A- No, I don't recall that phrase.

Q- You don't recall that. M'hm.

25 And various phrases -- that it was the doughboys in

World War I who popularized cigarettes.

Me BAKER:

If my friend is quoting ...

A- But I...

5 Q- Hold it, Dr. Pollay.

Me IRVING:

This man is a historian.

Me BAKER:

10 An historian he may be, but if my friend is trying to
make evidence through documents, let him at least place
the documents that he's referring to before the witness.

Me IRVING:

My Lord, this is cross-examination. I am just testing
the witness' knowledge of...

15 Me BAKER:

What his memory?

THE COURT:

20 If you're citing from sources, put the source in front
of the witness where he could see, because obviously you
may be cross-examining and nobody's challenging that,
but it doesn't mean that what you say, and this is with
all due respect, is what is written in the book. You
may paraphrase or you may say things.

Me IRVING:

25 Q- Well, let me show him, then, Mr. Gunther's book. This

is John Gunther's "Taken at the Flood."

Me BAKER:

Is that the whole book or is that a photocopy of some pages?

5 Me IRVING:

It's the page I was reading from. It's page one sixty-three (163).

Q- It was World War I which made manufactured cigarettes a universal craze. That was the phrase I read to Dr.

10 Pollay.

Me BAKER:

Just let him read the page.

Me IRVING:

Oh, go ahead.

15 Me BAKER:

Who knows what's on that page, Mr. Irving.

A- Well, I know the source as well. It's a biographical discussion, A.D. Lasker -- I'll still need that -- A.D. Lasker was the head of an ad agency by the name of Lord & Thomas in Chicago and they were -- became a very prominent ad agency, largely because they did the work for American Tobacco and Lucky Strike. That account alone was large enough so that at one time they were the largest agency in the U.S. And that account was --
20 accounted for something like fifty-eight percent (58%)
25

of their total billings.

THE COURT:

And what's that got to do with the question that was asked to you?

5 A- The World War I which made manufactured cigarettes a universal craze, and it goes on:

"... before that many smokers thought they were vaguely effeminate."

Okay. That's the point I was making, that the
10 perception of cigarette smoking after the First World War was made more heroic, because now soldiers were cigarette smokers, it wasn't just the urban dandies.

He does not discuss the sampling activity which you've already acknowledged as -- was extensive during
15 that time period. So to say that it was the war covers a wide variety of activities during those war years.

Q- The page I just put in front of you is the very page you cite yourself, do you not, at page seven (7) of your report? Same book, same page? Gunther, nineteen sixty
20 (1960), page one sixty-three (163)?

A- Yes.

THE COURT:

Would you...

Me IRVING:

25 Surely, My Lord. This would be a good time.

THE COURT:

Okay. Ten (10) minutes?

SHORT RECESS

5

Me IRVING:

Q- Just at the break, Dr. Pollay, we were talking about Mr.
Gunther's book and the effect of World War I on
cigarette smoking prevalence. You said something I
10 didn't quite catch about the sampling activities. Do
you recall saying that?

A- Yes.

Q- In what connection did you use the expression "sampling
activities"? Was that related in any way to the use of
15 cigarettes in the war by soldiers?

A- The sampling, what I meant by sampling was the -- the
distribution of cigarettes either on a free basis or at
a greatly reduced cost, perhaps tax free, to the
soldiers. I mean, from a management point of view,
20 that's a sampling activity.

Q- But the cigarettes were provided to the soldiers in
World War I at the request of the army itself, weren't
they? This is no sampling by the companies? It was a
request from the army to provide them, wasn't it?

25 A- I don't know the circumstances in Canada. In the U.S.,

I believe General Purshing did request the cigarettes.

Q- But it had nothing to do with sampling, did it?

A- Well, it is still a sampling activity.

Q- But the cigarettes were provided in the United States --
5 you don't know about Canada -- because General Purshing
required they should be so provided, isn't that so?

A- Yes, he asked that they be part of the ration pack, the
standard issue.

Q- And required it?

10 A- Yes.

THE COURT:

Is this Purshing written the same way as the missile?

Me BAKER:

Yes.

15 Me IRVING:

Yes, My Lord. I think the latter was named for the
former.

THE COURT:

Right.

20 Me BAKER:

Unless you know something that we don't know.

Me IRVING:

Q- And one (1) of the reasons that cigarette consumption
grew so dramatically in World War I was that General
25 Purshing required that cigarettes should be provided to

the troops as part of the rations, wasn't it?

5 A- Yes, and that was capitalized upon after the war with advertising that called attention to the fact that the doughboys were smokers and featured the soldiers in uniform.

Q- Now, Dr. Pollay, at page seven (7) and eight (8) of your report, you deal with what you call the female segment. Do you have that in front of you?

A- M'hm.

10 Q- And again, as I read it, the conclusion which you state at page eight (8), that:

"... the consumption of cigarettes by women climbed dramatically ..."

-- appears to be related only to advertising.

15 Is there anything other than advertising which is mentioned in those pages?

A- Oh, I mention Hollywood movies and the Easter parade in New York City and other social events of that nature, public relations activities.

20 Q- M'hm. And according to your expert report, direct marketing to women began in nineteen twenty-six (1926), is that so?

A- That's the date of the first of the major national campaigns featuring women in the ads. I've since then
25 seen some minor brands that had women in ads predating

that but that's still generally known as the Hallmark event.

5 Q- If I read what you have written here correctly, the conclusion you are conveying to the Court is that the great increase in smoking among women was the result of advertising, is that what you're saying to us?

10 A- The -- yes, that advertising was a significant factor and I would say working hand-in-hand with the public relations. I mean, I would say similar things about the public relations effort working very hard towards the end of popularizing smoking among women, smoking of cigarettes among women.

Q- I want to put to you a passage from Schudson's book on the subject of women and smoking...

15 Me BAKER:

If you would be good enough to give it back to him when you read it.

Me IRVING:

Certainly.

20 Q- Schudson refers to somebody, Eric Barnow, who, he says: "Holds that advertising was responsible for bringing women into the cigarette market"

A- Yes, Eric Barnow is a Columbia University distinguished historian of broadcasting.

25 Q- Okay. And Mr. Schudson goes on to say this:

"This conclusion is difficult to sustain for a number of reasons. The most obvious of which is that ten of thousands of women began smoking cigarettes in the 1920s before a single advertisement was directed toward them. It is more accurate to observe that cigarette smoking among women led tobacco companies to advertise toward the female market than to suggest that advertising created the market in the first place. The mass media played a role in spreading the cigarette habit among women but it was primarily the information conveyed in news stories, not the persuasion attempted in advertisements that helped, in the first instance, to legitimate smoking among women in the 1920s".

Do you accept Mr. Schudson's view, Doctor?

A- Not entirely. I -- I mean I certainly accept some of the facts, that there was some smoking by women before the first of the major national campaigns toward women and the fact that the mass media played a role in spreading the cigarette habit among women.

It's -- I don't know on what basis he judges the relative import of the information contained in news stories from that of advertising, and I think he greatly

underestimates the extent to which those news stories were, in fact, the result of public relations efforts. Since doing this, I've been doing some research on the public relations activities of the firms and I'm

5 convinced that it was a significant factor of its own in getting stories and photos in the newspapers across the nation to model the smoking among women.

Q- It is a fact, is it not, Dr. Pollay, that there is a whole chapter in Schudson on the development of smoking

10 among women?

A- That's correct.

Q- Have you read that?

A- Yes, I have.

Q- And can you confirm to the Court that Mr. Schudson

15 refers to a great number of factors having to do with the emancipation of women, with their changing role in society, with their changing role in the job market and other such matters as being factors of great importance in the spread of cigarette smoking among women?

A- Yes. And as we've just discussed, he acknowledges the

20 role of the stories in the news media. I think he underappreciates the extent to which those stories were the result of public relations efforts initiated by the firms and the PR firms in the employ of the tobacco

25 companies, because I don't think he had access to those

kind of documents and records. Nor is he -- he's not a MBA or a business prof. so he may not have had the interest in that kinds of documentation.

5 Q- He's, nevertheless, an author who you cite in your own expert report to the Court, isn't he?

A- Yes.

10 Q- Okay. Isn't it a fact and to your knowledge that the use of the cigarette in the early nineteen twenties (1920s) became one of the major symbols of emancipation among that generation of young women?

15 A- Yes. And I believe -- in fact, I cite one of the incidents that I think shows the role of public relations in order to dramatize that emancipation symbol, women were hired to march in the Easter Parade and wear placards that identified their lit cigarettes as -- the exact phrase was "Torches of Liberty." And to understand, in those days smoking in public by a woman was a fairly audacious thing to do, so this was quite an out -- outspoken, in a sense, activity on the part of the women.

20 Q- It was banned in some places, wasn't it, Dr. Pollay?

A- I'm sure it was banned in some places, yes. I'm sure colleges were trying to discourage it and...

25 Q- And there was the Sullivan ordinance in New York which banned smoking in public by women?

A- I don't know the dates or the scope of that.

Q- Don't know about that? No. You don't know that it was repealed in nineteen nineteen (1919)?

A- No, I don't recall that specifically.

5 Q- No. Do you know how many states in the United States at one time banned cigarettes altogether?

A- No, I do not.

Q- You don't know that. And you don't know when those bans would have been repealed?

10 A- No, I do not.

Q- No. And would you agree with me that that kind of history is clearly an important part of any serious attempt to understand how it came about that people started to smoke, when we find things like laws banning it, laws banning women from smoking.

15

A- Well, to the extent that those laws were no longer in extant in the twenties (20s) and thirties (30s), no I do not see that.

Q- But you don't know whether they're extant or not, do you?

20

A- That's correct.

Q- No. Did you read the nineteen eighty (1980) Surgeon General's report?

THE COURT:

25

Which year?

Me IRVING:

Nineteen eighty (1980)?

A- I don't recall. I've seen several Surgeon General's reports. I can't recall by the date alone which one of
5 them. There's been twenty (20) over the twenty-five (25) years. I don't recall which one that would be.

Q- M'h'm. It had to do with women and smoking, Dr. Pollay. Did you read that one?

A- I remember reading excerpts from it.

10 Q- M'h'm. Do you recall reading, in the part written by Dr. Jeffrey Harris, that smoking -- cigarette smoking among women never reached more than one quarter ($\frac{1}{4}$) until the Second World War?

A- No, I don't recall that.

15 Q- You don't recall that. Do you recall reading, Dr. Harris' chapter in that report at all?

A- No, I do not, actually.

Q- Are you familiar with Dr. Roberta Ferrence's diffusion theory of how new products become popular and then
20 decline?

A- No, and I'm not even sure of the context. I mean, this diffusion theory...

Q- Well, let me tell you about her.

A- ... is she an epidemiologist?

25 Q- No, she's a Crown witness.

THE COURT:

It doesn't make her either...

A- She may or may not be.

Me BAKER:

5	Correct.
---	----------

Me IRVING:

She is a sociologist, I think, by profession, Dr.

Pollay, and she works at the Addiction Research

Foundation in Toronto; and she proposed to the Court a

10 theory called the diffusion theory, under which new

products which come into a market will be tried first by

those in the upper socioeconomic levels because they

have more money, they are less conservative and they

have more access to communications.

15 A- Yes. A similar theory appears in marketing textbooks

under the name of sort of the trickle-down theory as

sort of part of the product life cycle or maturing of

the market phenomenon.

Q- That's right. And her theory was that women, because

20 | their earnings are not equal to those of men, would have

come into a market, including the cigarette market,

sometime after men. Does that surprise you?

Me BAKER:

Before you answer that question. My Lord, my friend is

25 putting questions to the witness that relate to prior

testimony. I think it would be appropriate for my
friend to lay the testimony before the witness because
he is interpreting that testimony, and that I don't
think he should do when he's putting questions to the
witness.

Me IRVING:

My Lord...

THE COURT:

Pardon? What did you say, Mr. Irving?

Me IRVING:

I'm sorry. Do you want me to put the transcript to him?

Me BAKER:

I certainly do.

Me IRVING:

Well, My Lord, when I'm simply asking if he knows about
something, I don't believe I'm bound to put the
transcript.

Me BAKER:

He's already answered the question that he wasn't aware
of her propounding of the theory.

Me IRVING:

Well, he said he thought it was similar to another one.
I'm just going on to see if he would agree that it's not
-- well, I'll wait for your ruling.

THE COURT:

Well, it depends...

Me IRVING:

I don't know that...

5 THE COURT:

...on the question. If you're going to relate your question directly to Dr. Ferrence, I'd like you to put the transcript. If you're asking a general question, that's something else.

10 Me IRVING:

Well, let me ask one more question and we'll see, My Lord. I'll try to put it a slightly different way.

Q- Leaving aside Dr. Ferrence for the moment, Dr. Pollay, in that same theory of marketing which you referred to a moment ago, do you not see a trend where people with rather less money, rather less access to communications will come into a new product market later than those with more of both and will get out of that market rather later than the others?

15
20 A- My understanding of the diffusion models, which they say is sort of an underlying phenomenon to the sort of mature market dynamics or the product life cycle dynamics is that it is not necessarily dependent upon income, that who is the innovator and who is the imitator can vary from product to product. As I say,
25

it's not necessarily the most affluent who are always the first to try new product concepts. That's quite obvious in some fashion styles, where it's the young and not the wealthy who are the innovators.

5 Q- All right. Well, we will leave Dr. Ferrence.

A- I would think that would be true for cigarettes as well, and as I don't think in the twenties (20s), for example, that it would have been the women of wealth and position who were the pioneers in smoking so much as the young women who were known then as the suffragettes who were more heavily represented among the smoking population.

10

Q- M'hm. Let me read you another passage from Mr. Schudson, this time at page one ninety-seven (197). He says this:

15

"Despite the importance of the commercial interest involved in spreading the use of cigarettes among women, the change that occurred was a cultural one. It was made possible by changes in the cigarette product itself, by World War I's transformation of social habits and by a new class of women who sponsored the cigarette in its political and social battles."

20

Me BAKER:

25

Just before you take that away from him, just let him

look at the page. He's entitled to at least that, Mr. Irving.

A- Yes, I have read the book, yes.

Me IRVING:

5 Q- All right. Now, do you accept that the change was indeed a cultural one? Well, I don't like to lean over the witness' shoulder, My Lord, but I only have one (1) copy so I...

A- Yes, again, it's -- as I've said before, I mean the
10 social circumstances create conditions in which the potential for growth occurs and then the timing and magnitude of the growth then seems to depend upon what he describes as the importance of the commercial interest involved in spreading the use of cigarettes
15 among women. But there certainly are what historians would call preconditions necessary. I mean advertising does not work in a vacuum.

Q- I have an extra copy now, My Lord, which I've put in front of the witness. All right.

20 Me BAKER:

Is this, excuse me just for a moment, is this the...

Me IRVING:

It's the same page. No, it's not the entire book but it's the...

25 Q- I go on, Doctor...

Me BAKER:

What page are you reading now?

Me IRVING:

It's still page one ninety seven (197).

5 Q- "It was made possible by changes in the
cigarette product itself."

The fact is, Dr. Pollay, is it not, that in the period
around the time of the First World War, there were great
changes in the product itself, are you aware of that?

10 A- I'm not exactly sure of the timing of phasing in, but I
do know that the Camel brand in nineteen fourteen (1914)
represented a new kind of cigarette with less reliance
on Turkish tobacco.

Q- It was milder, wasn't it?

15 A- Probably, yes. Less aromatic too, I would think.

Q- He goes on -- so you would agree, then, it was made
possible by the changes in the product itself?

A- Well, I would agree that that's probably a contributing
factor.

20 Q- World War I's transformation of social habits -- you
would agree that World War I produced a transformation
of social habits, would you not?

A- Yes, as I've explained, because of the sampling and
advertising activity building upon that.

25 Q- And by a new class of women who sponsored the cigarette?

A- Yes, as I say, the cigarette was positioned as a symbol of freedom so it was part of the emancipation. If you wanted to declare your liberation as a woman, you could smoke like a man.

5 Q- You are aware, Dr. Pollay, that there was an enormous and profound change in the role and position of women commencing at about that time?

A- I hesitate to comment because there are a lot of contemporary women who denied that it was profound enough, but there was a beginnings of change in that era.

10 Q- I'm not suggesting it was profound enough. I'm simply saying it was profound? You would agree with that?

A- I'm not sure what profound means. There was a beginning of social change. There were -- there were single women in the cities, there was the Suffragette Movement.

15 Q- Now, down at the bottom of that page, it says:

"That advertising has played a role since the late 1920s in promoting smoking among women should not blind us to the fact that this change in consumption patterns, like many others, has roots deep in cultural change and political conflict, that advertising often responds to but rarely creates."

20
25 Do you agree with that?

A- Well, as I've said, advertising always works within a cultural context. I mean advertising plays the role in promoting smoking among women. That is, expanding its use, but the basic social circumstances, that is the historical preconditions that are clearly there. That is things like women being in the cities and away from their families or working in new kinds of professional responsibilities or eager to declare themselves as modern in some way.

Q- When a product is new or is new to a particular group of people, and it has just become socially acceptable to use it at all, are those not conditions that you would expect as a prelude to a big increase in consumption among that group, and would you not expect advertising under those circumstance to have that kind of effect?

A- Well, I think advertising is part of what makes it legitimate. It's part of what helps broadcast to people, especially outside of the city centers, the fact that it is now a contemporary thing to do, that it's part of the modeling for the community that cigarette smoking among women is getting more popular and more commonplace.

Q- When did cigarette smoking among women begin to get less popular and less common place in Canada, if you know?

A- I don't know the facts of that.

Q- You don't know that?

A- No. In fact, as I understand it, cigarette smoking is still quite common among women. I mean the rates of fall-off have been more dramatic among men than among women.

Q- Do you know at all what the rate of fall-off among women has been, when it started?

A- No, I do not have that data in front of me nor have I prepared that.

Q- And you never looked at that?

A- No, beyond the Ferrence Study I quote.

Q- If it turned out, Dr. Pollay, that -- I'll leave that.

I want to look with you, for a moment or two, at the next section of your report, which you have called "The Concerned Segment." It begins at page eight (8).

Are you aware of the report of the Isabelle Committee in Canada?

A- No, I'm not.

Q- You don't know what that is. Was it drawn to your attention, Dr. Pollay, that the government of Canada, speaking through the Minister of Health, on several occasions, directed the tobacco companies in the late nineteen seventies (1970s) and early nineteen eighties (1980s), to lower overall the levels of tar and nicotine in their cigarettes?

A- It was not drawn -- that was not drawn to my attention, although I am aware that that has happened.

Q- But you were not made aware that that was done at the instance of the government of Canada?

5 A- I understood that there was -- I only know that there was no law requiring such.

Q- M'h'm. And have you been shown any of the correspondence which has been produced in this case, including letters from the Minister of Health instructing the companies not only to lower their tar and nicotine levels but to get out and promote the new lower tar, lower nicotine cigarettes so as to convert people to their use?

10

A- No, I have not see that.

Q- Have not seen that. And do you not think that's part of the history, as it were, of the growth and decline of cigarette smoking and the growth of the -- what you call the concerned segment, the lower tar segment?

15

Me BAKER:

Well, hold on. My Lord, I don't know what my friend means by the use of the word "that," but if that relates to the question previously asked the witness, which he denies being aware of, then the question he has just asked is inappropriate.

20

THE COURT:

25 Overruled.

A- Would you repeat the question, please?

Me IRVING:

Q- I was afraid you'd ask that.

THE COURT:

5 Whether or not the fact that the government had asked
the companies to reduce the tar and nicotine levels and
to promote low tar and nicotine cigarettes had any
influence on the emergence of a concerned segment.
That's another way of putting it.

10 Me IRVING:

Yes, My Lord. That's...

A- Well, I think the concerned segment certainly existed
prior to that time. In my efforts, I think you asked
about that in reference to history.

15 Q- Okay. In fact, Dr. Pollay, there have been articles in
the public press for many years now, have there not, in
Canada, and there have been publications from the
government of Canada itself indicating that for those
who wish to continue smoking they would be very well
20 advised to smoke low tar and low nicotine cigarettes;
isn't that a fact?

A- I don't know how many articles or news stories are
specific to that point, but in a general manner of
speaking there certainly has been a fair amount of
25 publicity about health hazards of smoking going back to

the nineteen fifties (1950s), although the number of such stories is pretty small compared to the volume of the advertising.

Q- All right. We'll come to that in a minute. At the
5 moment, I'm suggesting to you, or I'm asking you whether you know, as a historian dealing with these matters, that as a matter of fact it has been recommended on a great many occasions by the government itself that those who wished to smoke cigarettes would do well to smoke
10 low tar and low nicotine cigarettes for health reasons, and that there have been a great many articles in the public press across Canada for many years indicating exactly the same thing: that if you do smoke, you should smoke low tar cigarettes?

15 A- I'm not aware of those at all, that the -- that articles are specific to that point. And I should also say that the historical respect that I tried to provide was for the early years in the U.S. I don't present myself as having detailed knowledge of the Canadian history, nor
20 does the report cover that topic.

Q- I see. Now, going back earlier than the nineteen
fifties (1950s), it is also a fact, is it not, Dr.
Pollay, and let's stay with the United States since
you're more comfortable there, that there were literally
25 thousands of articles and newspapers, starting at the

turn of the century, condemning cigarette smoking as dangerous and that you could really hardly read just the regular press without seeing complaints about cigarette smoking?

5 A- No...

Q- You don't remember any of that?

A- ...I would disagree quite strongly with that portrayal. I mean I think these stories were scattered and irregular in contrast to the quite persistent and
10 pervasive advertising.

Q- There were groups like the Women's Christian Temperance Union, do you know that group?

A- Yes. Yes, their primary focus, I think, is on alcohol and its abuse.

15 Q- Yes. And they're still active in Canada, aren't they?

A- I don't know.

Q- You don't know. The record will eventually show. But the W.C.T.U. was very anti-cigarette, wasn't it?

THE COURT:

20 What is the W.C.T.U.?

Me IRVING:

The Women's Christian Temperance Union, My Lord.

THE COURT:

Oh.

25

Me IRVING:

It's a very interesting group. They wrote a number of letters to Mr. Epp, which we could look at if we wanted.

Me BAKER:

5 Does that make them, by definition, dangerous?

Me IRVING:

Mr. Epp.

Q- Is it not to your knowledge that they were vocal, vociferous in their opposition to the use of cigarettes?

10 A- They may well have held that position. How vocal they were, that is how well broadcast their position was to the general community, that I can't speak to. I would doubt that there were many people who were made aware of that. They would not be a daily news item.

15 Q- Now, Dr. Pollay, let me put the question to you directly. Are you saying to the Court that you have, as part of your historical review, checked or had others check for you on the incidence of articles in the public press in the United States condemning smoking on health grounds right through the whole of this century?

20 A- No, I've seen some of that evidence presented in other trials and I still hold that as frequent as those stories might have been, and they come in flurries around the health scare in the early fifties (50s) and
25 the release of the Surgeon General's reports and the

Royal College of Surgeons, Physicians and Surgeons Reports, that those still are few in number and sporadic compared to the persistence of the advertising activity.

I should also add that there were similar stories appearing in the press representing the industry point of view. That is, denying the validity of these health allegations and attacking them as simply loose talk, so that the -- I think the reader of the press, if they were relying solely on the newspaper editorial and ignoring all the advertising, would still be left with an equivocal set of information, some people alleging health problems and other people denying it.

Q- Are you not aware that in this country, Dr. Pollay, and in recent years, there have been repeated publications, repeated reports in the public press showing tar and nicotine levels, so that people could choose lower tar and lower nicotine cigarettes.

As a Canadian resident now, Canadian citizen, living in B.C., have you not seen those? I'm going to show you some, if you haven't.

Me BAKER:

Show him some. Don't threaten him, show them to him.

A- Yeah. I think perhaps you should, because in my reading of daily newspapers, I would think those events are rare.

Q- Bring on the library.

Me IRVING:

I don't have copies here for the moment, but I just want
to find out if you're familiar with articles of this
kind, Dr. Pollay?

Me BAKER:

Hold on. Let the record show that the witness has been
handed a document which appears to have at the top a
dateline, Ottawa -- below a dateline, Washington.

Handwritten into the document is the Montreal Gazette.

I think it reads December thirteen (13), nineteen
sixty-nine (1969), page five (5). If my friend tells me
that's where he found it or got it from, I'm satisfied.

But I want the record to show that the print of the
Gazette doesn't appear on this document. It is the
Gazette, is it not?

Me IRVING:

Yes.

A- Is that the date, sixty-nine ('69). Yes, I have to
document. Your question about it, again?

Me IRVING:

Q. Well, I'm just asking -- have a look at it, Dr. Pollay,
and tell me whether you don't recall seeing articles of
that ...

Me BAKER:

Seeing that in nineteen sixty-nine (1969)? Come on!

Me IRVING:

... articles of that kind?

5 A- Well, I wasn't here in nineteen sixty-nine (1969), but I don't know what the circulation of the Gazette is, but this would have been a story on one (1) day. And we've seen in the media plans a campaign for one (1) brand of cigarettes might produce something like fifteen million
10 (15,000,000) exposures. A story like this comes and goes. It's there one (1) day, and yesterday's newspaper is used to push the garbage out.

Q- And nowadays, Dr. Pollay, the ads on the cigarette packages will show the tar and nicotine content, don't
15 they?

A- Yes.

Q- Yes.

A- Yes, because of Health and Welfare regulations requiring that.

20 Q- And would you agree with me that showing the tar and nicotine in the advertisements is a buyer's guide which will assist the informed consumer in picking a cigarette with low tar, if he or she wishes to use low tar cigarettes?

25 A- Well, the informed consumer is best able to make that

choice among alternatives at a retail environment where that information is available about several brands.

I can't speak to how well served the consumer is by that information, because I don't know the extent to which the lower tar and nicotine products are, indeed, healthier. I don't have that...

Q- Let's just assume for the moment that they may be. Would you agree with me that for the consumer it is important to be informed as to the tar and nicotine levels in a cigarette, and that the cigarette package itself and the ads, with that information in it is, indeed, a buyer's guide which will assist in making an informed decision?

A- It might. Although I find that very few ads contain that information. That is, the information is contained only in the Health and Welfare warning, not in the advertising.

Q- The warning forms part of all advertising, doesn't it?

A- No, the warning is an addendum to the advertising required by law.

Q- If you're looking at the advertising page, you see that, don't you?

A- No. I mean, most -- I disagree quite strongly. In many forms of advertising, the warning is placed so as to be minimally observable. On billboards it's so small as to

be illegible. I don't believe it's of major import and that there are any advertisements that I can recall that give emphasis to it in the recent years.

5 Q- I want to read you from Exhibit RJR-39, which is a press release of August the first (1st), nineteen eighty-five (1985)...

Me BAKER:

Hold on for just a moment -- you're referring to RJR-39?

Me IRVING:

10 39, yes.

Me BAKER:

Yes. Hold on.

Me IRVING:

15 Q- It's headed "Communiqué de presse de Santé et Bien-Être". We draw your attention first to the middle of the first page, Dr. Pollay. You will note, first of all, that this is a press release from Jake Epp, the then Minister of Health and Welfare. It's at the top.

A- I can't read that from my copy.

20 Q- Health and Welfare Minister Jake Epp today released the results. Do you see that?

A- Oh, yes. Yes, the results show that all cigarettes are hazardous, even those that contain neither tobacco nor nicotine.

25 Q- Now, you want to read some more, Dr. Pollay. I was

going to draw your attention to the middle of the page.

"Manufacturers have been requested by the
department to reduce the average tar yield to
12 milligrams by the end of 1984, taking into
account the sales of each brand."

I thought you might be interested in that.

Me BAKER:

Are you asking him questions or asking what he's
interested in?

Me IRVING:

No, because Dr. Pollay said before he wasn't aware of
that initiative by the government. I'm just pointing it
out that that's one (1) example. I'm showing it to Dr.
Pollay.

Me BAKER:

That's very kind of you but could you confine yourself
to questions, Mr. Irving.

Me IRVING:

Q- Now, would you turn the page, Dr. Pollay. I read the
following:

"The tar and nicotine values printed on
packages are a buyer's guide to cigarettes
with lower average yields of toxic substances
the minister noted."

Do you disagree with the minister?

A- Well, as I've said, I think the packages perhaps is the best vehicle because it's off -- from the package that a shopper in a retail setting can make the comparisons between alternative products, but I note here it says
5 that -- let me see:

"The healthiest comparison they can make is between whatever brand they smoke and the choice not to smoke at all."

Q- Did you not say this morning, Dr. Pollay, that the more
10 information the potential consumer has the better?

A- Yes, I would accept that. I mean, there's a question of relevance of the information, but it's generally to better inform the consumer, to better serve the consumer.

Q- Now, Dr. Pollay, would you look at the very first page
15 of your report. You indicate that advertising has been defined by the leading Canadian text and the American Marketing Association as -- and I leave aside the quote. The leading Canadian text, I take it from the footnote,
20 is Darmon and Laroche, nineteen eighty-four (1984)?

A- Yes, that's correct.

Q- Advertising Management in Canada?

A- Yes.

Q- Is that the book?

25 A- Yes, it is.

Q- Have you another copy with you?

A- No, I do not.

Q- I take it since you describe it as the leading text in Canada, you've read it?

5 A- Yes, I've used it for teaching.

Q- I see. Is it -- is it currently on your reading list for teaching?

A- No, my courses now run on a project basis rather than on a text basis.

10 THE COURT:

And the Mr. Laroche in question is the next witness, I understand?

Me IRVING:

The next witness, My Lord, yes.

15 Me BAKER:

And he's the gentleman with the dark hair from the back of the room smiling at Your Lordship.

Me IRVING:

20 Q- I just want to go through with you a few passages from Mr. Laroche's book, and I seem cleverly not to have made a note of the...

Me BAKER:

Just ask him if he agrees with everything in the book.

Me IRVING:

25 Q- We had evidence earlier in this case, Dr. Pollay, from a

Dr. Leonard Reid, who said to the Court that advertising really cannot manipulate consumers to buy products they don't really want. Would you agree with that?

5 A- Yes, to the extent that consumers have made a clear and knowledgeable decision and you have no new information to provide, I would presume that that would be generally true. I mean their perceptions about the product can gradually change over time, but it's the conventional metaphor of a consumer as a puppet at the hands of this
10 -- the advertiser pulling the strings is clearly an overdrawn metaphor. That's not the way advertising works.

Q- No. So to the extent that that's what Doctor Reid said, you agree with it?

15 A- That's right. I mean, to the extent that that's what's meant by manipulation and that does not happen in that direct way.

Q- And is it not also a fact which you would accept, Dr. Pollay, that there is a life cycle for any individual
20 consumer product?

A- There tends to be a predictable historical flow of events associated sometimes with this diffusion notion you mentioned before, where the popularity grows until it reaches some plateau. This is sometimes known as the
25 mature market or product life cycle thing and that phase

where the sales are stable is sometimes known as the mature phase.

Q- M'hm. That's right. And isn't that also the phase where the product is universally known? You don't have any more information to convey about the product because everybody already knows about the product?

A- Well, of course, the product is never universally known because there are always new people entering the market and if the thrust of your questions is as to whether or not the cigarette industry is a mature market, that I adamantly deny.

Q- I didn't ask you that, Dr. Pollay, for the moment. I just asked you whether..

Me BAKER:

But he answered it.

Me IRVING:

Q- ...there was a life cycle generally applicable to the products and if one of the stages of that was the maturity stage?

A- I deny its applicability to the cigarette industry.

Q- And in products in general -- and I'm not asking about the cigarette industry -- there is a cycle which includes a maturity period, isn't there?

A- But there's tremendous uncertainty. I mean there's great doubt about the generalizability of this product

life cycle concept. The most authoritative piece that comes to my mind is a piece published in the Harvard Business Review, whose title, I think, speaks eloquently. It said: "Forget the Product Life Cycle Concept." It was authored by the vice-presidents of Research for J. Walter Thompson Advertising Agency and they argued, quite convincingly, that this was not a very good guide for managerial action.

It, of course, persists in textbooks because it provides a generalization that's handy for teaching purposes, a memory device, but it's rarely relied on extensively. That is, it's usually dealt with in a few pages in passing out of a large book.

Q- Is there a point when a product is newly developed that advertising serves the purpose of giving people information about the qualities of the product itself which they didn't previously know?

A- Advertising might perform that function when there's novelty of the product, yes.

Q- Yes. The market two (2) years ago for a product like VCRs, would be an example, would it not?

A- Yes.

Q- And computers now?

A- It would seem so.

Q- Yes. So that there is, in that kind of advertising, an

informational aspect?

5 A- Yes. I think the challenge to the validity of the product life cycle isn't to the point of are products at some stage, new. The issue is more -- is what are the implications as they do mature. That is, does that mean that their destiny is sealed and that somehow management action must, therefore, follow a certain course or can the product be relaunched, revitalized and ...

10 Q- Give me an example of a product which is at the mature stage now?

15 A- Well, as I say, I don't find the concept of generalizable validity, so I hesitate to nominate any example, because most products are capable of being revitalized -- and I further would say that even for products that are generally well-known, that doesn't mean that there's no function for advertising.

20 There continues to be advertising for products that are well-established in the society to support the demand in competition with other products. I mean, that's why we see advertising for eggs and milk and beef and wool and silk and diamonds and gold even, to support the demand. To keep the demand persistent. In part because there are new buyers entering the market, in part to just remind and reassure people, to maintain the demand that might otherwise decline.

25

Q- I'll ask you again, Doctor, are you able to give the Court the name of one single consumer product which is in the mature stage?

THE COURT:

5 Well, he doesn't accept the concept.

Me IRVING:

Well, My Lord, he did before. And...

THE COURT:

Well...

10 A- No, I say I don't accept the general...

Me IRVING:

Q- You don't accept it at all.

A- ...the general validity of it.

Q- All right.

15 A- I mean there are -- you can certainly find products which, for the time being, might be in a period of stability. The mature market concept is a teaching shorthand to indicate to the student that for some products management's attention might be better served to focus on the brand switching issue. That is that the -- the low rates of starting and quitting and most of the action in the market would be switching between brands.

20 Q- Let me...

25

THE COURT:

So if you don't accept the concept, therefore your comment about the cigarette market not being a mature one is not a valid one, since you don't accept what -- a mature market concept.

A- I mean there's general debate about the general validity of the market. Even with that general model, it's not at all clear that the cigarette industry fits the general model because of the very high rates of quitting and...

Q- Yes, but you can't put it both ways. It's either one or the other. Either you accept the concept and we discuss it or you don't.

A- Well, as I say, the concept is just as a generalization, but when you find any specific, it's hard to fit the specific, especially in the case of cigarettes, to that general model.

Me IRVING:

Q- Let me read you something from Darmon and Laroche and ask you if you agree with it, Dr. Pollay. Since you don't have it here, I'll put it in front of you.

Reading at page four hundred and ninety-nine (499), Darmon and Laroche, Advertising Management in Canada -- and I'm going to come back to other parts of it later, but just for the moment I read the following:

"Statistics show that 80% of new products introduced into the market are rejected by consumers."

Do you accept that?

5 A- Yes. In that case new products refers to -- probably to the vast number of supermarket packaged goods that are launched in any year. I mean, they're some -- many times they are just -- they're product line extensions -- like a flavour of a soup or things.

10 Q- It goes on to say -- this is interesting in the light of what you just said:

"The well-known example is the Edsel automobile which was introduced by the Ford Motor Company in 1957. This pioneer of the automobile industry lacked neither promotional funds, expertise in engineering or
15 sophistication, but the Edsel proved to be a monumental failure."

Do you recall that?

20 A- Yes, I do.

Q- The book goes on:

"This particular case has been analyzed from many different angles. The results of all available analyses point to one fundamental
25 fact. The company tried to sell a product for

5 which there was absolutely no need or desire
 at the time. This point cannot be
 over-emphasized. Vast amounts of money spent
 on advertising and publicity to promote a
 given brand of cigarettes will not persuade a
 non-smoker to smoke. The opposite is also
 true. Thus far, advertising efforts to reduce
 the intake of cigarette smokers have failed."

10 Do you agree with that, from the leading Canadian text
 on advertising, Dr. Pollay?

A- Well, I think that comes back to your point before about
 the...

Q- Well, first of all, would you tell me whether you
 agree...

15 Me BAKER:

 Let him answer the question the way he's answering the
 question.

Me IRVING:

 My Lord, just a moment, I'm entitled ...

20 THE COURT:

 First of all, he has to answer the question, and then he
 can qualify if he wishes to.

Me IRVING:

 That's right.

25 Q- Do you agree or don't you, Dr. Pollay?

A- I would agree that a person who has made a decision not to smoke would be hard to persuade.

Q- Do you agree with what is written there or not?

THE COURT:

5 You may say yes, no, and you may qualify it.

A- Yes. I agree that vast amounts of money spent on advertising publicity to promote a given brand of cigarettes will not persuade a non-smoker to smoke. The word -- by non-smoker, we mean someone who has made a decision not to smoke.

10

Me IRVING:

Q- Doesn't he mean, by non-smoker, someone who doesn't smoke, Dr. Pollay?

A- I think you'll have to ask him what he means, but my -- I would agree with it to the extent that that's a decision taken and affirmed by an adult.

15

Q- My Lord, it -- it's just on four-thirty (4H30), would this be an appropriate moment.

THE COURT:

20

Yes. Tomorrow at ten (10H00).

Me IRVING:

Tomorrow at ten (10H00).

ADJOURNMENT

25

I, the undersigned, DIANE LAMBERT, recording monitor, swear that I have personally conducted the recording of the preceding evidence and representations, verifying continually the quality of said recording, that I have prepared minutes of this hearing with due attention and that in no case was the equipment used defective.

AND I HAVE SIGNED :

Diane Lambert

DIANE LAMBERT

I, the undersigned, JANE WEAVER, proof reader, swear that the preceding pages are and contain the faithful and accurate transcription of the English recording.

AND I HAVE SIGNED :

Jane Weaver

JANE WEAVER

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

COUR SUPÉRIEURE

SOUS LA PRÉSIDENCE DE L'HONORABLE JUGE [REDACTED] BOT, J.C.S.

No: 500-05-009755-883

RJR-MACDONALD INC.
Requérante

IMPERIAL TOBACCO LIMITÉE
Requérante

c.

LE PROCUREUR GÉNÉRAL DU
CANADA
Intimé

c.

LE PROCUREUR GÉNÉRAL DU
CANADA
Intimé

3 avril 1990 - Vol. 56

COMPARUTIONS :

Pour la requérante
RJR-MACDONALD INC.

Pour la requérante
IMPERIAL TOBACCO LIMITÉE

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In the year of Our Lord nineteen hundred and ninety (1990),
on this third (3rd) day of the month of April, PERSONALLY
CAME AND APPEARED:

5 Me COLIN K. IRVING:

Pour la requérante, RJR-Macdonald, Colin Irving et
Georges Thibaut.

Me LYNDON A.J. BARNES:

Pour Imperial Tobacco, Lyndon Barnes.

10 Me ROGER E. BAKER, Q.C.:

For the Attorney General, Roger Baker, Claude Joyal,
Lorianne Weston and Lise Tremblay.

THE COURT:

I hope you all feel well this morning.

15 Me BAKER:

Do we look that bad? We do -- and you, My Lord?

THE COURT:

Now, somehow, I woke up this morning with the title of a
book in my head. Do you know what it's called? "A day
20 in the life of Ivan Denissovitch". It's probably the
weather outside.

Me BAKER:

Speaking of headaches, My Lord, there is a small bit of
kitchen work, if you don't mind. I made an undertaking
25 last week, as you know, to Mr. Irving and RJR-Macdonald

that I would give him a document, and as I look at it,
it's ten (10) pages dated and signed by Dr. Harris. If
my friends can make any sense of these numbers, I don't
mean their experts but I mean them, then I welcome them
5 to it. So I want it recorded that they are now in
possession of the data that we undertook to provide.

1/0076 Me IRVING:

Well, just a minute. I'm not sure I am in possession of
the data I asked for at all. Perhaps my friend could
10 explain to me what these headings mean first?

Me BAKER:

I have absolutely no appreciation of what those headings
mean.

Me IRVING:

15 My Lord, what I asked for was the actual consumption
data as charted by Dr. Harris in the exhibit -- the
number of which I don't recall at the moment -- where he
showed consumption in the countries listed in the T.S.B.
report from nineteen sixty (1960) to nineteen eighty-six
20 (1986).

What Mr. Baker has given me -- I'll hand it up to
the Court so you can see, My Lord -- it's a series of
numbers derived, obviously, by Dr. Harris from the data.
It may be that by working backwards to the computer I
25 can find out what the actual consumption data was for

each of those years, but I am not in a position to tell you that I can do so.

THE COURT:

I'm not in a position to appreciate what this is per se.

5 Me IRVING:

No.

Me BAKER:

My Lord, you will recall -- I don't have the transcript open in front of me -- that Mr. Irving asked for the data in respect of a regression analysis. That we undertook to give. I went back to my office with Dr. Harris, he punched his computer and that's what came out. That was the basis on which that document was prepared. That was the undertaking and that's what he's got.

15 Me IRVING:

My Lord, my friend...

Me BAKER:

Now my recommendation is this, My Lord, so as we don't get into a ludicrous colloquy because neither of us understand that document that you've got in front of you. Let Mr. Irving give it to his experts.

20 Me IRVING:

Well, just a moment. I mean, we can debate this matter later when Dr. Pollay is not in the witness box, if you

like, My Lord, but you will recall -- and our request was quite clear -- we were given charts showing points on a chart representing consumption in grams per adult over the age of fifteen (15) for a series of countries. The charts will tell you fairly accurately what the actual consumption figure was, but not exactly. I wanted the data...

THE COURT:

May I suggest that we wait until I see the record?

Me IRVING:

Surely, My Lord.

THE COURT:

I quite frankly don't remember what you asked for. I have to check that. You take his word for now and maybe at the break we'll...

Me BAKER:

Now, there is a second bit of kitchen work, My Lord.

I'm referring to yesterday's transcript. First, at page eight four five two (8452), and you have a discussion or a series of questions and answers between Mr. Irving and Dr. Pollay in respect of an advertising campaign, "Smoke Smart". Of course, Mr. Irving asks him if he's seen it, he's looked at it, he said he had. Go to the following page. Mr. Irving asks for an undertaking:

"Please, make me an undertaking to get me a

copy of the answers that you may bring to the Court."

He reiterates at page eight four five nine (8459). He says:

5 "Before I go on, Dr. Pollay, I'm looking for the "Smoke Smart" campaign. If I didn't make it clear already, I'm asking you whether it is not a fact that no such campaign was ever run in the country by RJR-Macdonald."

10 Somewhere yesterday, oh, yes, at page eight four five three (8453), he asked the witness whether in reading Mr. Hoult's testimony he didn't double-check, because Mr. Hoult, as you know, denied that campaign was ever run. And so I'll refer your Lordship to volume IV, 15 twenty-seventh (27th) of September, nineteen eighty-nine (1989). Peter Hoult is testifying.

THE COURT:

What page?

Me BAKER:

20 Four nine o (490), My Lord. In discussing the campaign, in the middle of the page at approximately line thirteen (13), I'm asking Mr. Hoult:

"Do you, however, know whether it did?"

-- meaning run. Answer:

25 "I have no recollection of ever seeing an ad

that could be described with a headline "Think Smart," in fact."

Question, Baker:

"No, it's 'Smoke Smart'."

5 We asked him at the bottom of the page four nine o (490) whether he could determine whether the ad ever ran. He comes back that afternoon to Court at page four nine eight (498). I am in the middle of cross-examination. He wants to make a statement. Mr. Irving insists that
10 he's entitled to give his answer and so the question is put to Mr. Hoult at line sixteen (16) on page four nine eight (498) of Volume IV, twenty-seventh (27th) of September, nineteen eighty-nine (1989):

"Was it run or wasn't it run?"

15 Answer:

"The answer is that the campaign was never run."

Now, I have in my hands a photocopy of the campaign. Being Purolated from Vancouver is the
20 original colour copy. This came in over a fax machine last night. Dr. Pollay has in his possession the slide. I don't know if it's in his pocket or in his briefcase. This is the Smoke Smart campaign that Mr. Hoult so kindly went back to his office to call his people in
25 Toronto because they verified things so -- ever so

exhibit. I shouldn't think you'd give me much trouble
on that score.

Me IRVING:

My Lord, we will, of course, check with the company and
5 see how accurate that is. If it was, in fact, run, it
can easily be filed as an RJR exhibit but I am not in a
position at the moment to confirm whether it was or
wasn't, but we will double-check. I don't think the
appearances were completed, were they? Mr. Baker is so
10 eager to -- are we ready to go?

BY THE CLERK:

No, I have just to...

In the year of Our Lord nineteen hundred and ninety (1990),
on this third (3rd) day of the month of April, PERSONALLY
CAME AND APPEARED:

5 RICHARD W. POLLAY, aged forty-nine (49), residing at
[DELETED]

WHO, after having been duly sworn on the Holy Bible, doth
10 depose and say as follows:

Me BAKER:

Then, My Lord, given Mr. Irving's response, I would --
with the indulgence of the Court, like to file that
15 document now.

THE COURT:

Then give it a number.

BY THE CLERK:

AG-225.

20 Me BAKER:

Yes, this is the Vantage ad Smoke Smart.

CROSS-EXAMINATION BY Me COLIN K. IRVING,

On behalf of the Petitioner, RJR-Macdonald Inc.:

25 Q- Dr. Pollay, at the adjournment yesterday I had read to

you a passage from Darmon and Laroche, and if you look at the transcript at page eight five one six (8516), which is the last page...

Me BAKER:

5 Before my friend continues with this question, My Lord, if he's going to have a discussion with this witness in respect of what he read to the witness yesterday from Darmon and Laroche, I would respectfully request that the document be put in front of him. The last passage
10 that Mr. Irving read, because it wasn't in front of the witness yesterday. I read the book last night.

Me IRVING:

We put the book in front of the witness and read it.

Me BAKER:

15 Certainly not.

Me IRVING:

Well, he and I looked at it together, as you will recall, My Lord.

Me BAKER:

20 He read from an earlier page when he showed him the book and then he took the book away; and when he read the last passage, the page was not open in front of Dr. Pollay.

THE COURT:

25 We'll wait for the question and see what is the

question.

Me IRVING:

Q- Dr. Pollay, I'm looking at the answer you gave starting
at line ten (10), you say...

5 Me BAKER:

What page are you now?

Me IRVING:

"Yes ..."

Page eight five one six (8516) of the transcript.

10 "Yes, I agree that vast amounts of money spent
on advertising publicity to promote a given
brand of cigarettes will not persuade a
non-smoker to smoke. The word -- by
non-smoker, we mean someone who has made the
15 decision not to smoke."

And then I put the question:

"Doesn't he mean by non-smoker, someone who doesn't
smoke, Dr. Pollay?"

And your answer is:

20 "I think you'll have to ask him what he means,
but I would certainly agree with it to the
extent that that's a decision taken and
affirmed by an adult."

Now, I wanted to ask you, Dr. Pollay, if it wasn't a
25 fact that when you -- is Mr. Baker planning on standing

up or...

Me BAKER:

I take my instructions from the Court, Mr. Irving.

Me IRVING:

5 Well, My Lord, would the Court instruct Mr. Baker to sit
down while I'm cross-examining.

THE COURT:

I just did.

Me IRVING:

10 Thank you, My Lord. Were those good enough instructions
for you, Mr. Baker?

Q- Now, Dr. Pollay...

Me BAKER:

Quite.

15 Me IRVING:

Q- ... may I suggest to you that there is a good deal of
evidence to show, and learned opinion, to indicate that
when we come to the subject of adolescents and children,
that they are not affected by advertising any more than
20 adults once they reach a certain stage, and don't, in
fact, you find that in Darmon and Laroche itself?

Me BAKER:

25 I object to the question, My Lord. If the basis for the
question is the statement that was put to the witness
yesterday and the answer that he gave on it without the

witness having the opportunity to look at the entire paragraph, then it's inconceivable that he could give an answer that may or may not -- that he could give an answer that's necessarily in context with the rest of what appears in the Laroche book. I have the book here, My Lord. See what's yellowed out on the top left corner of that page, five hundred (500). I would submit to you that Dr. Pollay be entitled to look at that before he responds to the question.

10 THE COURT:

I don't see your point, quite frankly. Under reserve.

Me IRVING:

Q- Well, Dr. Pollay, would you answer the question, please?

Me BAKER:

15 Am I entitled to put the book in front of the witness, My Lord?

THE COURT:

Oh, yes, put the book if you want.

Me BAKER:

20 Thank you. That's the passage -- take your time.

A- May I have the question repeated by the...

Me IRVING:

Q- I was asking, Dr. Pollay, whether there isn't a good deal of evidence to suggest that in the case of adolescents, children even, that as they mature into
25

adolescence they learn what advertising is and they learn that it is an attempt to persuade and that they react to advertising once they've reached early adolescence in the same way as adults do? The question has nothing to do with the page you're looking at.

Is that not a well-known fact?

A- It is established that there is a maturing process by which adolescents do become increasingly aware of the purposes of advertising, but what's not clear is whether that awareness creates an immunity from the effects of advertising. Indeed, in the literature now there's reference to what's called the myth of self-immunity, that is the fact that people feel because they're aware of advertising that that makes them immune. Everyone in society has that feeling, and yet it's perfectly obvious that it cannot be the fact that all people are immune from all advertising or all advertising would be simply folly. It's hard to believe that all that spending is done by fools.

Q- Would you look at page five o two (502) of Darmon and Laroche, please.

My Lord, I have an extra copy of this part of the book I'll give to Mr. Baker if you like.

You'll see a heading at page five o two (502), Doctor, "Are Children More Persuasable?" Do you see

that?

A- Yes.

Q- And then the second paragraph below that starts with the sentence:

5 "Are children especially persuasable through advertising? If so, until what age? Until they are 13 years old as specified by Quebec law..."

10 Let's stop there. Do you know about that Quebec law, Dr. Pollay?

A- Yes, I do.

Q- Now, reading down that paragraph, just read it to yourself, but I would ask you to note that they were looking at ages seven (7), nine (9) and eleven (11) in the study which Dr. Larocche refers to here. Do you see that?

A- Yes.

Q- And just at the bottom of the left-hand column I read this.

20 "Another study conducted by Scott Ward, Daniel Wackman and Ellen Martella arrives at identical conclusions and suggests that the effects of advertising on children have been grossly overestimated. According to the results, children develop skeptical attitudes

25

and defense mechanisms against advertising
messages at an early age."

Do you agree with that, Doctor?

A- Yes, I do agree that they develop some skeptical
attitudes, but I don't agree that that constitutes a
total defense. Nor do I agree that skeptical attitudes
are the same as the kind of careful decision-making we
were talking about in the prelude to this question, that
is of people deciding not to smoke. A decision like
that requires both competence, consideration and
commitment. And any decision may be subject to review.
We make decisions on an ongoing basis all the time.
It's always subject to re-evaluation as our perceptions
change.

Q- You do note that we were speaking here of children
ranging in age from seven (7) to nine (9) to eleven
(11)?

A- I would say the same is true for children.

Q- The text goes on:

"That children develop defense mechanisms
against advertising was also demonstrated in a
previous study by Robertson and Rossiter which
showed that children can detect the persuasive
intent of an advertising message.

Furthermore, once a child can detect this

intention, he reacts against the persuasion.
According to the authors, a child capable of
detecting a persuasive intent is less
influenced by advertising because he places
5 less confidence in it, likes the advertisement
less and tends to make less purchase demands."

Do you agree with that?

A- I would agree with that, and I think that's why
advertising's very carefully created to avoid that kind
10 of rejection, to be likeable.

Q- And finally, at page five o three (503), in the
left-hand column, first full paragraph:

"Thus research conducted in this field seems
to conclude that the efficiency of advertising
15 aimed at children, while real, has often been
exaggerated. Children perceive at quite an
early age the persuasive intent of an
advertisement, develop mechanisms against it,
are submitted to the same saturation effects
20 as adults and are more influenced if they know
parents are likely to give in to their
demands."

Do you agree with that?

A- Yes, I think the context here about the exaggeration is
25 relative to the advocacy position taken by some

concerned parents groups. So this is the attempt by academics to put that in a more balanced perspective, but it does not mean that these awarenesses and cynicisms that the children may develop about advertising totally inoculate them from the effects of advertising, especially when the saturation phenomenon is going on.

5

Q- And we're discussing T.V. advertising in this book, aren't we, Dr. Pollay?

10

A- That's probably the primary context.

Q- And when we come to print media advertising, is it not a fact that young people, presmoking young people, while they may be attracted by television, are not particularly attracted to print media advertising at all; isn't that a fact?

15

A- I do not know that to be a fact at all. They're -- indeed, the nature of the print media advertising being as visual as it is, is quite attractive to most people. The nature of pictures and, of course, magazines aren't the only medium by any sense, dramatic displays occur at retail points of sale, on the sides of buildings and billboards...

20

Q- Well, let's just stay with print media advertising for the moment, Dr. Pollay.

25

Me BAKER:

Oh, I think he should be permitted to answer the question the way he was, My Lord.

THE COURT:

5 The question was print media.

Me IRVING:

Q- I want to show you a document which is a government production document. It's called: "Final Report, Feasibility Study for Health Warnings on Tobacco Packages," prepared by William Leis and Associates, and there's a project team, including yourself, Richard F. Pollay, Ph.D. Do you see that?

A- Yes, I do. Although my middle initial is not "F".

Q- I see. But that is you, Dr. Pollay?

15 A- I -- yes.

Q- Yes. Do you remember the project team?

A- Yes, but I did not have the final edit on this or I would not have misspelled my name.

Q- No! But you did read it, did you not?

20 A- I read it after it was submitted, yes.

Q- Did you file any dissenting opinion about it, Dr. Pollay?

A- No, I did not.

Q- No. Would you look at page one o two two seven (10227) in the large numbers at the bottom, My Lord.

25

THE COURT:

I'm sorry?

Me IRVING:

Page one o two two seven (10227). It's actually -- it's
5 page nineteen (19) at the top.

Q- This is marked: "Appendix I notes." I'm not going to
read it all out to you, Dr. Pollay, but if you'd look at
paragraph two (2), it says:

"The population group most at risk is, of
10 course, young persons who have not yet made
the decision to use tobacco products."

And then in the next paragraph you say this:

"However, this group is also by far the one
most difficult to "reach" by means of most
15 conventional health communication strategies.
There are a number of reasons for this. Many
of these persons don't worry about long-term
health risks, they respond to a unique set of
peer group pressures and they are not very
20 much attracted by print media communications."

Am I reading it correctly, Dr. Pollay? That's the
conclusion of the group which you formed a part of?

A- Well, this isn't the conclusion, this is a technical
note -- and I don't recall this, nor was I the author of
25 that note, nor do I know the data on which that was

based.

Q- I see. Did you dissociate yourself from that comment at the time or at any time since, Dr. Pollay?

A- No. And I don't think it's -- I mean, my judgment is that it probably has some merit. As I say, I think that's the reason why pictures speak louder than words.

Q- I'd have that marked, please, as RJR-177.

Is there not also evidence in the public domain, Dr. Pollay, that teenagers not only recognize ads generally, but they recognize cigarette ads and they don't like them? You don't remember reading that, for example, in the Surgeon General's reports and elsewhere?

A- I don't recall the specific reference you refer to?

Q- Well, I would refer you to the nineteen seventy-nine (1979) Surgeon General's report. Have you ever had the occasion to look at that, Dr. Pollay?

A- Yes, I have.

Q- Your counsel will give you a copy of it. I'll wait until you have it in front of you.

Look at chapter seventeen (17), please.

A- This is volume II we're looking at?

Q- Volume II.

THE COURT:

Okay. What chapter?

Me IRVING:

Chapter seventeen (17), My Lord.

A- And what page?

Q- Well, there are several pages, but first...

5 Me BAKER:

My Lord, if I may, before my friend gets to the
question. I'd like to lay down a general objection to
this entire line of questioning. My friend, Mr. Irving,
is cross-examining Dr. Pollay as though he were a child
10 psychologist. He has not attempted to qualify himself
at the beginning of his testimony in that regard. He
has analyzed ads and he has said on the record that
these ads appear to be healthy young people; that kind
of thing. But that is far different, when he's
15 testifying as an advertising specialist, from then being
open to being cross-examined on the literature, which,
as we know from the list of witnesses, is coming from a
child psychologist. That Dr. Pollay, in the sense that
Mr. Irving is now trying to cross-examine him, is not
20 competent to do.

THE COURT:

Do you want to put your answer for the record? Do you
want to answer it for the record?

Me IRVING:

25 Well, My Lord, yes. Dr. Pollay did not hesitate

5 yesterday, as you will recall, to look at a series of
advertisements and say: I pronounce that these are aimed
at youth, although he told us in cross-examination on
his qualifications that he was not able to give evidence
about the impact of ads. However, as you will recall,
he said, without any hesitation, that certain ads were
aimed at youth, so I am certainly entitled, in my
submission, to cross-examine him, if only on credibility
to see what he knows about the effect of ads on youth
10 and cross-examine on whether he knows anything about the
literature on the subject.

THE COURT:

Well, under reserve.

Me IRVING:

15 Q- Look at page fifteen (15) of chapter seventeen (17),
please, Dr. Pollay. You'll see a heading on the bottom
right: "Mass Media." Do you see that?

A- M'hm.

Q- It says this:

20 "In a task force report on respiratory
diseases, the National Institute of Health
state that mass media have been used
extensively in anti-smoking efforts. But
exactly how they influence behaviour is
25 unclear. Ward reports that in a study

designed to ascertain attitudes towards
television commercials, and to analyze the
effect of television advertising on
adolescents, the television medium appears to
influence the formation of ideas and
attitudes, yet does not trigger adolescents to
buy a product. Ward's study indicates that
cigarette ads are perceived by teenagers as
hypocritical and they're listed as least
liked, while anti-smoking ads are perceived as
"straightforward" and are liked."

Have you read that before, Dr. Pollay?

A- I recall the original study rather than this phrase.

Q- Do you disagree with what's stated in the Surgeon
General's report which I just read to you?

A- Well, I agree that Ward found that -- again, I don't
know that those kind of ads that are least liked are the
kind of ads that are the same ones we're talking about
as those that are designed to appeal to the needs and
motives of adolescents, like those that focus on
self-reliance.

There's a great variety of cigarette ads, some of
which are clearly not aimed at those audiences, and we
also see from the Tempo case that adolescents do react
to overt efforts toward them.

Q- They react negatively, don't they? That's what we see from the Tempo ads?

A- That's correct.

Q- Yes.

5 A- And that's why the advertising has to be careful not to be too blatant in that regard.

Q- That's right. It was found in the research done afterwards that there was a negative reaction to the perception that these were aimed at young people.

10 That's the part you didn't put in your report, isn't it?

A- Well, their context was clear in that report, and as I say, that's the reason why one needs to avoid being too blatant in that effort.

Q- M'hm.

15 A- Because it will precipitate a reaction.

Q- Isn't it also made quite clear in chapter seventeen (17) of the Surgeon General's report what the real initiators of smoking are, Dr. Pollay?

A- It identifies...

20 Q- Look at page...

A- ...a number of contributing factors.

Q- Yes. Look at page seventeen eleven (17.11), if you would. Halfway down that page:

25 "Smoking appears to be initiated as a result of social influences or more particularly the

imitation of models, such as peers, media

stereotypes and significant adults."

So on. And is it not a fact, Dr. Pollay, that not only
in chapter seventeen (17), but in an immense body of
literature we learn that parental example, peer
pressure, sibling influence, factors of that kind are
predictors of smoking behaviour?

A- Yes, but in turn, peer influences and peer group
acceptance and the perception of same, we also have seen
evidence of -- are in turn influenced by advertising.
So the advertising is still implicated in this social
dynamic.

Q- Now, look at page seventeen nine (17.9) if you would.
There is a suggestion there from the U.S. Public Health
Service which I'd like to put to you, at the top of the
page. The Surgeon General's report quotes the following
from the U.S. Public Health Service:

"It is futile to continue to tell teenagers
that smoking is harmful and that they
shouldn't do it. They know that it is
harmful, most do not want to do it. The most
effective thing we can do is to help them to
understand the benefits of smoking as compared
to the costs and dangers so that they will
have the facts that they need in order to make

a thoughtful decision on whether to smoke or
not to smoke."

Have you seen that before, Dr. Pollay?

A- Yes.

5 Q- Do you agree with it?

A- Well, it's quite hard to disagree with the general
principle of encouraging people to make a thoughtful
decision about smoking or not smoking. It is not clear
what they have in mind when they refer to the benefits
10 of smoking. We have seen evidence that teenagers in
Canada are also aware of some of the hazardous
consequences of smoking but, as the documents recited
indicate, they believe that these do not apply to
themselves. This is a characteristic often of
15 adolescents, to feel that they're not subject to the
same mortality as the rest of us.

Q- What document are you referring to, Dr. Pollay?

A- I'd have to search my report, but it was in the -- it
was entered in evidence yesterday about, I think it was
20 project sixteen (16) or one (1) of those...

Me BAKER:

We'll find it for you.

A- ...that people believe...

Q- Hold on.

25 A- It's in my report on page eighteen (18), Project

Plus/Minus. I don't have the reference number.

Me IRVING:

Q- Now, Dr. Pollay...

Me BAKER:

5 Hold on for just a moment, Mr. Irving, we're trying to find the document if you don't mind.

Me IRVING:

I just wanted that identified, Mr. Baker.

Me BAKER:

10 No, he asked him a question, My Lord. I think the witness should be allowed to refer...

Me IRVING:

I asked what document he's referring to -- no, go ahead.

A- Yes, the -- what I quote yesterday was the -- from the
15 highlights of that document that says that:

"Starters no longer disbelieve the dangers
..."

-- that is, they acknowledge the dangers --

"... but almost universally assume these risks
20 will not apply to themselves because they will not become addicted. Once addiction does take place, it becomes necessary for the smoker to make peace with the accepted hazards. This is done by a wide range of rationalizations."

25 Q- Now, what you've read is all printed at page eighteen

(18) of your report, Doctor?

A- Yes, that's right, and it was in the records yesterday.

Me BAKER:

What Dr. Pollay -- just for the record, what Dr. Pollay
just read, My Lord, is the study highlights in AG-217
which...

THE COURT:

Yes, it's all been said.

Me BAKER:

Yes, I know.

Me IRVING:

Q- Now, Dr. Pollay, I asked you yesterday whether it wasn't
a fact that the comments you had made about women
smoking in the period up to nineteen forty (1940), by
nineteen forty (1940) only in the United States, only
twenty-five percent (25%) of women were smoking and I
think you said that you weren't sure of that, was that
your answer?

A- I'm not sure of that but even if that were the case,
that would still be five (5) times as many as had been
the case in the twenties (20s). That's a very dramatic
growth.

Q- Do you not recall testifying yourself, Dr. Pollay, that
by nineteen forty (1940) the number was only twenty-six
percent (26%)?

A- I don't remember the exact number but it's in the report.

Q- It's not in the report, it's in your deposition in the Cipollone trial, where you were asked and gave evidence that by nineteen forty (1940) only twenty-six percent (26%) of women were smoking. Do you recall giving that evidence?

THE COURT:

I believe it's in the report too.

10 A- I don't remember the emphasis of "only" because I find twenty-six percent (26%) a very substantial number considering how few women had been smoking a very short -- a very few years previously.

Me IRVING:

15 It's in the annexes, My Lord, to Dr. Pollay's report at page twelve (12) of the notes about the history of cigarette advertising.

Q- Now, when did the overall Canadian market for cigarettes start to decline, Dr. Pollay?

20 A- I don't have that exact date.

Q- You know it is declining?

A- Yes, I know that the number of people smoking is declining, although I also -- it's my understanding that there's been an increase in the amount smoked by those people continuing to smoke.

25

Q- Can you...

A- So that the volume isn't declining as fast as the fraction of population smoking.

Q- And you have no idea when that trend began?

5 A- No, I couldn't date it. I have not attempted the historical analysis of the Canadian market. I have some graphs at home, I could find that information.

Q- Do you know, from your own research, Dr. Pollay, the relationship between the rise in advertising expenditure
10 in Canada in recent years and the decline in cigarette consumption?

A- No.

Q- No.

A- I do not.

15 Q- You do not.

A- Nor do I think that -- that one can simply look at those two (2) variables in isolation. It's clearly important to consider other factors, like price, like the changes in warning and the like.

20 Q- Yes, like social conditions?

A- That's correct.

Q- Like organization, industrialization, changes in economic conditions -- all of those things would matter, wouldn't they?

25 A- They would be the preconditions for other changes that

might take place.

Q- That's right. And you wouldn't be able to reach any firm conclusions unless you knew all that, would you, assuming you even knew what the decline was?

5 A- The more you knew about that, the better off you'd be, yes.

I would like to add that the fact that sales are declining for any product does not mean that the advertising is totally unimportant to the firm or
10 ineffective in the marketplace, because the real question, of course, is what would have been the sales decline in the absence of the advertising, not whether -- not the absolute growth or shrinkage but -- and unfortunately, we've had no good experimentation and we
15 had no regions or experimental groups for whom there is no advertising.

Q- Dr. Pollay, do you recall having been asked when you gave a deposition in the Cipollone case whether one of the ways to determine whether advertising is effective
20 is to examine sales data?

A- I don't recall it but I would stand by it, yes.

Q- Well, let me ask you. Is one (1) of the ways to determine whether advertising is effective to examine sales data?

25

Me BAKER:

My Lord...

A- That would be called...

Q- Mr. Pollay, hold on for a moment. May the witness have
5 the transcript in front of him?

Me IRVING:

If he wishes it, My Lord. I'm simply asking him the
same question now.

THE COURT:

10 No, but if you're...

Me IRVING:

Q- Well, in that case, let me put it to you, Dr. Pollay,
that you were asked in the Cipollone case, in the
deposition at page one twenty-three (123). Question:

15 "Is one (1) of the ways to determine whether
advertising is effective to examine sales
data?"

Answer:

20 "Yes, if that can be done in a fairly
carefully designed experimental test
situation. It's often quite difficult, in an
ongoing enterprise, to take sales data and
advertising data and be certain that the sales
observed are the consequences of the
25 advertising because so many other things may

5 be going on simultaneously. Sales force
 efforts, changing prices, changing
 distribution patterns, changing competitive
 behaviors, changing competitive prices and so
 on. So, it takes a fairly vigorous designed
 experimental situation in order to isolate the
 effect of an advertising campaign to be
 certain you are correctly attributing any
 effect to it."

10 Now, is that the question you were asked and is that the
 answer which you gave in the Cipollone deposition, Dr.
 Pollay?

A- Yes, except vigorous should be rigorous.

Q- Fairly rigorous.

15 A- Yes.

Q- It should probably be "a rigorously designed
 experimental situation", is that...

A- Perhaps it should have been, but I may have said it that
 way.

20 THE COURT:

Q- But do you still stand by that...

Me IRVING:

Q- It's still true?

25 A- Yes, the -- it's very difficult to assess advertising on
 the basis of sales, which is the reason why most

management practices use other kinds of moderating variables or intermediate variables. That is, look at -- for attitude change or comprehension or recall, because it takes so long for the advertising to manifest itself in sales patterns and that's so diffuse over time, it becomes -- whether or not those sales patterns are the result of advertising or other influences becomes a very murky analytical problem, often because we don't have the good data on the other influences.

10 THE COURT:

Q- All that being said, do you still agree with your statement?

A- Yes, the statement that -- that's right, I believe that's the thrust of it, that we need to consider other factors.

6/0052

Me IRVING:

Q- And that it takes a fairly rigorous designed experimental situation in order to isolate the effect of an advertising campaign? You still agree with that?

20 A- That's correct. I mean, in terms of sales. If what your concern is is what's the bottom line sales dollar contribution of this advertising effort, that's quite difficult, and in none of the documents that I've seen here or elsewhere do you see a one for one correspondence with we've spend this many dollars on a

25

campaign and we're realizing this many dollars in benefits. It's not that easy to trace out all the benefits.

Q- Did you read Mr. Hoult's evidence, Dr. Pollay, on how
5 RJR-Macdonald conceives its advertising campaigns, how it plans them, how it finances them and how it executes them?

A- I read that at one stage early on, but have read the documents in question which evidenced the facts of how
10 that's done.

Q- What I'm asking about: do you know, are you in a position to tell the Court from your reading how a decision is made within RJR-Macdonald to launch a campaign for any particular brand?

15 A- No.

Q- No. Are you in a position to tell the Court, Dr. Pollay, when they do plan an advertising campaign, what possible age groups are to be targeted?

A- Well, no, except for the documents that I've cited and
20 are in evidence already.

Q- Well, you've looked at documents. Can you tell the Court what the age groupings are for RJR-Macdonald advertising campaigns?

A- I think the age groupings are -- well, they differ for
25 the different products. I believe they begin at the age

of eighteen (18).

Q- The fact is that eighteen (18) to twenty-four (24) is the youngest age group, is it not?

A- I believe so.

5 Q- You believe so. If you were planning an advertising campaign yourself, Dr. Pollay, and you were told what target market your client wished to address and you were going to do the kind of sophisticated research which you have been discussing, would you not consider it
10 essential to do your research within the target group itself?

A- Yes.

Q- Yes. I mean, for example, if you were going to attempt to sell a product to women, for example, the people you
15 would interview in the course of doing your research would be women, would they not?

A- Yes.

Q- Yes. I asked you this before, perhaps you've thought about it overnight. Did you not notice, in looking at
20 the large volume of documents you were given from RJR-Macdonald, that all of the research was done among people who were already smokers?

A- Yes, although the definition for smoking is quite liberal -- I mean, one (1) cigarette is sufficient to be
25 classed for that purpose as a smoker.

Q- Are you telling...

A- And a lot of the research is focused still on starting.
That is, it's retrospective in character.

Q- Dr. Pollay, my question is: is it not a fact that the
5 documents themselves quite clearly show that all of the
groups who were interviewed by RJR-Macdonald, on its
behalf, in connection with their advertising campaigns,
were smokers?

Me BAKER:

10 I object, My Lord. It's improper for Mr. Irving to
characterize: "all of the documents quite clearly say".
There were twelve (12) or eight (8) or ten (10) boxes of
documents.

THE COURT:

15 But those that the witness has seen, obviously.

Me IRVING:

Yes, My Lord. He's here to talk about them, Mr. Baker
has them.

Q- Well, Dr. Pollay?

20 A- Yes, I've...

Q- Yes? Yes?

A- You'd better give me the exact wording of your question
again before I assent.

Q- My question, Doctor, was: did you not notice and is it
25 not a fact that in all of the research carried out by

RJR-Macdonald in connection with its advertising campaigns, that those who were interviewed were smokers?

THE COURT:

That the witness has been aware of himself.

5 Me IRVING:

Sorry, My Lord?

THE COURT:

That the witness has read himself.

Me IRVING:

10 Q- Yes, that you have read that that was always the case?

A- Yes, I believe that, as I say, with the caveats that they were smoking at least one (1) cigarette in -- that some of -- many of the studies were retrospective in character. That is, they weren't designed to test specific ad campaigns so much as to better understand the starting process.

15

Q- Dr. Pollay, among the documents you looked at, there were a great many which consisted of qualitative and quantitative research, which you then carried out to assess a possible advertising campaign. Do you remember that?

20

A- Yes.

Q- Yes. And that in doing that research which you described as amongst the most sophisticated you had ever seen, the methodology was to have actual interviews with

25

actual people, small groups and in some cases much larger groups than others? Do you remember that from reading the document?

A- Yes.

5 Q- Yes.

A- There are a large number of such studies.

Q- And in every case -- I'm not talking about retrospective -- that in every case, the people selected to participate in those interviews were always required to be smokers?

10

Me BAKER:

My Lord, it is improper for him to say "every case" when he's referring to a wide range of documents. Even if Dr. Pollay has read them, he may have read those documents six (6) months ago.

15

THE COURT:

No, the question is perfectly legal the way it was put.

Me IRVING:

Q- Could you please answer, Dr. Pollay?

20 A- Well, I can't speak to every case, but I recall no exception to that principle.

Q- That's right. And isn't it also a fact, Dr. Pollay, that when you read in the documents which you looked at the description of the target market for the ad as it was designed, that again, time after time, you see that

25

the market is smokers of a certain category of competitive cigarettes or smokers of a certain age group?

5 A- Well, except in some cases they are identified as starter smokers.

Q- Well, I think we've looked at that yesterday, Dr. Pollay. I would like you to tell me, a single campaign that you've looked at, to give me the document in which we find an RJR-Macdonald document in which the target
10 group is described as starter smokers. Just one, please.

A- One finds a reference to starter smokers in the Family Strategy document.

Q- At page?

15 A- Well, again, it's something we discussed yesterday...

Q- Yes, that's right.

A- ... and it's on the top of page, my report, page twenty-three (23).

Q- That's right. And I think...

20 A- About starter smokers choosing, because of the instant badge of masculinity, that the Export "A" brand provides.

Q- M'hm. That's right. That was the sentence which actually read: "It is hypothesized that", which you
25 excluded and put "Very young starter smokers choose

Export "A" because". And what document was that?

A- I believe it comes from the -- the reference is the preceding paragraph. I believe it's the Export Family Strategy document.

5 Q- Yes. That's right. And that's the one yesterday we looked at, Doctor, which says:

"Because we cannot direct either our copy or our creative to starters"?

Remember that?

10 THE COURT:

It's easier to look at the document.

Me IRVING:

Let's look at the document again.

THE COURT:

15 Or the document would speak by itself in many ways.

Me IRVING:

Yes, it does, My Lord. Well, this is now AG-222.

Q- So it is this document to which you would direct me, Dr. Pollay, in answer to my question?

20 A- I don't have the document in front of me.

THE COURT:

AG-222.

Me IRVING:

Q- AG-222. Would you give him AG-222, please?

25 Now, Dr. Pollay, I asked you whether you could

direct me to a single RJR document discussing an
advertising campaign directed against starters, and
you've referred me to AG-222, page seventy-three o two
(7302). I've read you this before, I'm going to read it
5 to you again. Do you see the paragraph...

Me BAKER:

Well, let him read the document for just a moment, Mr.
Irving.

Me IRVING:

10 Take as long as you like.

THE COURT:

And all that being said and all that being discussed,
the document will still speak by -- for itself.

Me IRVING:

15 Q- And do you not see on the next page, seven three o three
(7303), the actual target group for the advertising?

A- Yes.

Q- Thank you. I accept the implied suggestion, My Lord,
and I won't be long. But very briefly, another document
20 which we haven't yet gone over, Dr. Pollay, illustrates
the same point. Would you look at page thirty (30) of
your report, please, where you quote from a document
entitled: "Vantage Family, 1983 to 1987, Strategic Plan
1983, Operating Plan" -- that's in the second paragraph
25 under the heading Vantage, My Lord. The basic strategy,

you say, Doctor, was to position Vantage as an intelligent choice:

"Positioning Vantage is the only contemporary choice for intelligent smokers."

5 Do you see that?

A- Yes.

Q- The quotation stops there. Now, I want to show you the actual document from which the quotation is taken. I don't have an extra copy for the moment. First of all
10 the face page, so that we can identify it. Now, the words which you've put in quotation marks on page thirty (30) of your report are:

"Positioning Vantage is the only contemporary choice for intelligent smokers."

15 Do you agree with me, Doctor, that that comes from page eight four six eight (8468) of the document you're looking at at the moment?

A- Yes.

Q- Would you read to the Court the next sentence, which you
20 didn't quote?

A- "Marketing appeals will be directed to all smokers with primary emphasis against adults over 25 years with mid-upper incomes residing in urban centers."

25 Q- I would ask, My Lord, to have -- I would be very happy

simply to have that page put in...

Me BAKER:

No, no, no, file the whole document.

Me IRVING:

5 But if my friend wants the whole document, he can have
the whole document. Then I'd like to have the Vantage
Family, 1983-1987 Strategic Plan marked as Exhibit
RJR-178.

Q- Now, you had read that before, hadn't you, Dr. Pollay?

10 A- Yes.

THE COURT:

What was one seventy-seven (177)? Maître Irving, you
have not given any number to the pages you've cited from
the Advertising Management in Canada. Do you intend to
15 give it a number or not?

Me IRVING:

My Lord, then I should -- I'm sorry, I should give that
a number. Let that be RJR-179.

Q- Dr. Pollay, have you looked at studies on the degree to
20 which cigarette ads are recognized by young people in
Canada?

A- No, I have not.

Q- I'd like to show you briefly a document which is marked
RJR-74, which is "Social Marketing Research Study on
25 Non-smoking prepared for Health and Welfare Canada, New

Brunswick Department of Health and Community Services in the Saskatchewan Department of Health", where they report on the result of some research on brand recall.

Let me just ask you, have you ever seen that document, Dr. Pollay?

A- No, I have not.

Q- You've never seen it. Now, when an advertiser sets out to achieve some communications goal, Dr. Pollay, is it not a fact that there are a great many barriers which are in the way, among them what is known as advertising clutter?

A- That's correct.

Q- How many ads does the average Canadian see in a day, do you know, Dr. Pollay?

A- No, I don't know a precise number and I doubt that anyone has a precise number, but it would be many, presumably in the hundreds.

Q- Advertising clutter would be one of the major problems, wouldn't it, in getting your message through to your target audience?

A- Yes, I would agree with that, and in realizing an effect, too. There's many competing messages. That's part of the reason why single advertisements are so unlikely to have impact and why sustained effort over the years is required.

Q- Did you not find reference, in fact, in the RJR documents to the difficulties created by media clutter?

A- I don't have a specific recall, but I'm sure from place to place there would be such references. It would be a hard problem to ignore.

Q- And is not another problem, Dr. Pollay, the phenomenon which is generally referred to in the literature as selective attention? Selective attention: do you know that phrase?

A- Yes, I do.

Q- What does it mean?

A- It means that people are inclined to attend to stimulus objects, like advertisements, to a -- with a greater propensity if they match their needs. That is, motivation will have an influence on perception. A simple example of that would be if we were -- you and I were to walk down the street and I was more hungry than you, I might pay more attention to the restaurants on the street.

Q- M'hm.

A- You might be observing something else.

Q- We've had the example of cat food in this case. I mean, I take it you would agree that people who don't own a cat don't pay much attention to cat food advertising, for example?

A- Probably not.

Q- No. Men don't pay much attention to products specifically designed for women; that sort of thing?

5 A- Probably not. But as I say, it's a more generalizable principle than that as perception is a function of motivational states.

Q- M'hm. And in fact, notwithstanding what you said yesterday, Dr. Pollay, individual articles in the public press on smoking have, from time to time, had a most
10 dramatic effect, haven't they?

A- Individual articles?

Q- Yes.

A- I can't think of an individual article that has had that impact. Certainly some events have had dramatic effect.
15 The release of the College of Surgeon's report or the Surgeon General's report, with all of its follow-up publicity and discussion has a cumulative effect.

Q- What about the Reader's Digest article, "Cancer by the Carton." When was that published?

20 A- That was published in nineteen fifty-two (1952), December of nineteen fifty-two (1952).

Q- M'hm. And did that not have a very dramatic effect which you have noted yourself in the annex?

A- Yes. And, again, not only in and of itself, but also in
25 the echoing of that story and the discussion of it

through other media.

Q- Cigarette consumption, in fact, declined after that article, didn't it?

A- Yes, it declined briefly.

5 Q- M'hm.

A- For a short period of time.

Q- And you note that in your annex to your report, don't you?

A- Yes.

10 Q- Yes. And was there another Reader's Digest article in nineteen fifty-seven (1957) which had some kind of an impact on sales of Kent cigarettes?

A- I don't know the nature of the impact of that sales, but the Reader's Digest did have a series of articles over
15 those years. They were one of the few media taking on the cigarette problem, because they were not recipient of any cigarette advertising revenue. They were advertising free at that time.

Q- You don't know the effect. I'm looking at page
20 twenty-six (26) of your notes, Dr. Pollay, in the annex.

THE COURT:

Well, I don't have the annex.

Me IRVING:

You don't have the annex, My Lord.

25

Me BAKER:

We'll give you a copy, My Lord.

THE COURT:

But I have seen the nineteen fifty-two (1952), is that
5 in Doctor Laroche or in Dr. Pollay?

A- No, I make mention of that -- it's normally thought of
as the hallmark event. That is the...

Me JOYAL:

Page eight (8).

10 THE COURT:

Right. Just found it.

A- ...the first time in which what was going on and
becoming known in the medical community was brought to
public attention.

15 Me IRVING:

Q- You said a minute ago you didn't know what the actual
result was, Dr. Pollay?

A- I didn't -- I said I wasn't sure what the effects were
on Kent. The impact, in fifty-seven ('57), on Kent.

20 Q- Oh, well, look at your annex, would you please, at page
twenty-six (26) of the history of cigarette advertising
part.

A- Yes.

THE COURT:

25 Page what?

Me IRVING:

Page twenty-six (26), My Lord.

Q- I'm reading from the last paragraph, above the heading
"Motivation Research."

5 "Kent's new micronite filter of tiny natural
fibers added to the cellulose acetate gets big
boost from Reader's Digest article, 'Wanted
and available: filtertips that really work.'
Almost official endorsement. Sales jumped
10 from 3.4 billion to 15 billion, saves
Lorillard."

That's -- I'm quoting accurately from your annex,
Doctor?

A- Well, except mis -- omitting the parenthetical
15 observation that Fortune Magazine in sixty-three ('63)
thought those tiny natural fibers were asbestos.

Q- Yes.

A- The sales jump, of course, is still going on with -- I
mean in that context -- it's supported by a very heavy
20 advertising. The Kent campaign was the largest product
launched and continuing advertising effort up until that
point in history. It was a very substantial marketing
program.

Q- In fact, what were the tar wars?

25 A- The tar wars was a term used by some of the analysts to

describe a period of time in which the competing manufacturers engaged in a variety of advertising to give emphasis to the tar and nicotine content in their product, sometimes in comparative advertising.

5 Q- M'h'm. And that happened in the United States?

A- That's correct.

Q- It didn't happen in Canada, did it?

A- Not to my knowledge. The United States is a more competitive environment. There are six (6) major tobacco firms in the U.S.

10 Q- Doctor, given what you think about advertising, let me put to you a hypothetical situation in which there are several companies competing in a consumer market for a product which is technically undifferentiated.

15 What would happen, in your opinion, if one of those competitors ceased advertising his brands and the other competitors continued to advertise their brands?

A- That advertiser's share of the market would probably decline.

20 Q- I have no further questions, My Lord.

THE COURT:

We'll take a break before you start.

Me BARNES:

Thank you, My Lord.

25

SHORT RECESS

CROSS-EXAMINATION BY Me LYNDON A.J. BARNES,

On behalf of Petitioner, Imperial Tobacco Limited:

5 Q- Dr. Pollay, are you familiar with a publication called
"The Canadian Media Directors -- Directors Council Media
Digest"?

A- Yes, I am.

10 Q- And is that a document that you would use from time to
time to look at the circulation figures for magazines?

A- Yes.

15 Q- Dr. Pollay, I'd like to show you the nineteen
eighty-seven - nineteen eighty-eight (1987-1988) edition
of that magazine and direct your attention to, in
particular, page number fifty-two (52), if you would.
Do you have that in front of you?

A- Yes, I do.

20 Q- And, Dr. Pollay, if I understand what I'm reading, that
page sets out for June of nineteen eighty-six (1986) the
circulation figures of U.S. magazines with Canadian
circulations of in excess of thirty thousand (30,000).
Is that correct?

A- That's correct. The data based in nineteen eighty-six
(1986).

25 Q- That's correct, and published in nineteen eighty-seven

(1987)? I believe that's the date?

A- Republished. Originally published from an American source in eighty-six ('86).

Q- And you would accept this as an authoritative source for circulation figures, Dr. Pollay?

A- Yes, it's a gross kind of data. That is, it doesn't give the breakdown as to what the characters of the audiences are, but it's a gross indication of its circulation.

Q- All right. And I just wish to just point out to you, if I might for a moment, the following magazines: Life, Newsweek, People's Weekly, Playboy and Sports Illustrated.

THE COURT:

Just a minute. Life, Newsweek...

Me BARNES:

People's Weekly, Playboy and Sports Illustrated.

THE COURT:

Play...

Me BARNES:

Playboy and Sports Illustrated, My Lord.

Q- Do you see those?

A- Yes, I do.

Q- And the circulation figures of those individual magazines range from a low of just under eighty-six

thousand (86,000) to a high of just over a hundred and sixty thousand (160,000). Do you agree with that?

A- That's correct.

Q- All right. And, Dr. Pollay, you indicated in your last question to Mr. Irving before the break that in a competitive market, if one of the competitors was unable to advertise, that there would be a reduction in market for that particular company, did you not?

A- Yes, in the long run. It would take some time, but that would be the final import.

Q- And you're aware that under the existing legislation, the legislation that brings us together today, that these American magazines will continue to come into Canada with their advertisements? You're aware of that?

A- Yes, I am.

Q- And, Dr. Pollay, I don't need to turn these up, but to tell you that those five (5) magazines that I have just drawn your attention to, the October nineteen eighty-nine (1989) edition of each of those magazines is filed in this Court and each of those magazines contains cigarette advertisements.

A- Yes, I'm not surprised. Sports Illustrated has always very densely...

Q- I'm not asking you if you were surprised but, I mean, do you agree with me that they contain them?

A- I suspect they contain many advertisements.

Q- And so that if we look at these circulation figures, I take it that a circulation figure is the number of copies that are actually distributed?

5 A- That's correct.

Q- And on top of that there'd be another calculation to the extent that I receive the magazine, I might pass it on to another family member or a friend to look at it?

A- That's correct.

10 Q- And from that, the fact that I have a circulation figure of, let's say a hundred thousand (100,000), the number of people that might actually see that magazine would exceed that?

A- Yes, that's correct.

15 Q- And do you have any rule of thumb as to what you would say that figure would be?

A- Magazine pass-on readership?

Q- Yes.

A- No, I wouldn't know for these magazines what that would be.

20

Q- So in any event, to just complete this point, you'll agree with me that there's going to be a substantial circulation of magazines in this country containing cigarette advertising, despite the fact that there's a ban?

25

- A- Well, there will be circulation. The issue of how substantial it is, I'm not sure how to speak to. This general issue of spill-over advertising, it strikes me it's only magazines of this nature where you see it, because it's not spilling over in television or -- newspapers have very low spill-over rates.
- Q- Well, we're not dealing with television because there isn't cigarette advertising on television. Isn't that correct, Dr. Pollay?
- A- Yes, and the same with billboards. You have low spill-over promotions and...
- Q- But it is -- but if we look at these numbers, the circulation figures that are before you are quite high for the magazines that we know contain cigarette advertising in Canada?
- A- Well, they're high, but even the highest is less than ten percent (10%) of the population. I mean, a hundred and sixty thousand (160,000) copies of Playboy is substantial but not saturation.
- Q- I'm not suggesting it is saturation but it is high, you'll agree with me on that?
- A- Well, again, it depends upon the benchmark. I mean a conventional...
- Q- You used the word "high".

Me BAKER:

Let him answer the question, please.

A- It depends on the benchmark. The media plans we've been
looking at, typically you're looking at a reach of
5 eighty (80%) to ninety percent (90%) of the population,
so data that suggests a reach of ten percent (10%) of
the population by that comparison is not too dramatic.

Me BARNES:

Q- Oh, we're not comparing. By looking at circulation
10 figures, we're not comparing reach. Now, we're
comparing apples and oranges. These are circulation
figures, are they not?

A- I don't understand the point you're making.

Q- Well...

15 A- I mean...

Q- ... let's...

A- ... a reach is based upon circulation and the ...

THE COURT:

Q- The reach of population would be based on circulation
20 and pass-on readership?

A- Yes, and then...

Q- And you don't know the readership?

A- ... in a complex campaign with multiple media, the
cumulative reach depends upon the degree of overlap
25 between various media and the redundancy in their

audiences.

Me BARNES:

Q- Well, let's see if we can agree that despite the ban
there's going to be a substantial circulation of
5 magazines in Canada today that contain cigarette
advertising? Will you agree with that?

A- Yes.

Q- All right. Might we file just the page, My Lord, as the
next exhibit?

10 THE CLERK:

ITL-39.

Me BARNES:

Q- Now, Dr. Pollay, you've come to this Court as an expert
to give evidence, is that not correct?

15 A- Yes.

Me BAKER:

I think it's pretty obvious by now, Mr. Barnes.

Me BARNES:

20 Well, that's good, Mr. Baker. I just want to make sure
we understand.

Q- And would you say, Dr. Pollay, that one of the functions
of the expert is to assist the Court?

Me BAKER:

25 My Lord, I wonder whether that is, at this stage, a --
either an appropriate or a fair question for this

witness. The law determines what an expert is supposed to do. This expert has done it, the Court will determine what role or what function he has served. Why should he be asking an expert what his role is?

5 Me BARNES:

I think that, My Lord, I...

Me BAKER:

Testimony is testimony.

Me BARNES:

10 I'd like to know what Dr. Pollay thinks his role as an expert is, My Lord. I'd like to pursue that.

THE COURT:

Well, how is that going to help me?

Me BARNES:

15 Well, perhaps if I could just proceed.

Q- Let me ask you this, Dr. Pollay. Do you think, as an expert, that your evidence should be objective?

A- Yes.

Q- All right. Dr. Pollay, I want to show to you a postcard
20 -- and I have copies for my friends. Now, first of all, Dr. Pollay, I take it that you're familiar with that postcard?

A- Yes, I am.

Q- And the heading on that postcard is: "Getting Away with
25 Murder!"

A- On the obverse, yes.

Q- Right. That's the heading?

A- Yes, on the face it's a reproduction of an ad from the
nineteen thirties (1930s).

5 Q- Right. And the -- on the backside of the page, the page
with the text, we see in bold letters: "Getting Away
with Murder!"

A- Yes.

10 Q- And who is it that's getting away with murder, Dr.
Pollay?

A- That's an idiomatic expression for the relationship in
the U.S. between the cigarette firms and the regulatory
agency, primarily the Federal Trade Commission.

15 Q- You're not suggesting here that the industry's getting
away with murder? Isn't that the implication?

A- Well, it's used idiomatically, just as you might, in
winning a trial, say to your colleagues that you got
away with murder.

20 Q- But isn't the implication that you intend from this
phrase, which is your phrase, that it's the tobacco
industry that's getting away with murder?

Me BAKER:

It's not established that it's his phrase, My Lord.
That's part of the postcard.

25

Ne BARNES:

All right.

A- No, I will -- it is my phrase. It was the title given
to a lecture I first gave as an ethics lecture in -- and
5 I thought the title catchy enough that I've been using
it for promotional purposes.

THE COURT:

It said there: "provocative presentation."

A- Yes, well, many of the stories from the American History
10 are quite stunning to the average listener, like the
fact that came up before the break about asbestos being
alleged to be part of the Kent filter.

Q- And the lecture is given by the expert witness for the
first U.S. Plaintiff to be awarded damages for cancer?

15 A- Yes, that was Rose Cipollone, although that has since
been overturned and will be retried.

Q- And says at the top: "Lucky Strike, Getting Away With
Murder!" referred to the campaign with Lucky Strike,
isn't it?

20 A- Yes, the Lucky Strike was the original imprint on the
postcard, referring to the ad that says twenty thousand
six hundred and seventy-nine (20,679) physicians say
Luckies are less irritating. That ad was subject to
some substantial condemnation by the American Medical
25 Association in their editorial.

Me BARNES:

Q- Now, let's try and understand the purpose of this document. Did you indicate just a moment ago that it was a promotional document prepared by you?

5 A- Yes, it calls attention to, among the academic community, to the fact that this lecture has been given and is prepared.

Q- And I take it that the purpose of distributing this card is to make it known that you're prepared to put the presentation on again?

10 A- Yes, I've been invited recently by Penn State University to give the Donald W. Davis Lecture there, presenting this material. It was done under the same title.

Q- And how many copies of this particular postcard did you have prepared?

15 A- This was circulated to those people who assisted me in the reviewing and -- of an editorial supervision of manuscripts for the Association for Consumer Research meetings. There were about two hundred (200) such people, so I guess -- I mean, that would have been the order of magnitude. There may have been a few other people from other lists that I mailed it to, but it would be a couple of hundred of these were circulated.

20 Q- And the purpose was to solicit invitations for you to come and make this presentation, this provocative

25

presentation?

A- Well, a number of people had been asking me about what I had and so, yes, I did provide that information to people.

5 Q- Okay. And...

A- It's also -- I mean I do this kind of thing frequently. That is, send thank you notes to people using reproductions of historical advertising as a signature behaviour for the history of advertising archives.

10 Q- But the reproduction on the one side is the Lucky Strike ad from what year?

A- I believe that's nineteen twenty-nine (1929).

Q- And the text on the other side though, is composed by you?

15 A- Yes, with the exception of what's probably obvious, is the notes of the manufacturer along the bottom.

Q- All right. Let's look at the next paragraph or the second paragraph:

20 "Given by the expert witness for the first U.S. Plaintiff to be awarded damages for cancer."

Now, were you the only expert witness for the Plaintiff?

A- No.

Q- So really...

25 A- I was the only one who testified about the advertising,

as far as I know. I mean there were others who testified about consumer behaviour.

Q- So you're not "the" expert witness, you're "an" expert witness for the Plaintiff?

5 A- Well, in the context of the advertising, I was the expert witness.

Q- Did Dr. Cohen testify?

A- Yes.

Q- And what did he testify about?

10 A- Consumer behaviour and Rose Cipollone in specific.

Q- And consumer behaviour as it related to advertising?

A- Well, I'm sure he touched upon that, but his focus was on Rose Cipollone and the psychology of her.

Q- And what's this, the function that you have with the Canadian government as a consultant?

A- Well, that just refers to this role.

Q- And that's to appear in this Court?

A- Yes, to review those sixteen (16) boxes of documents, to provide the managerial perspective on cigarette advertising management.

20

Q- Would you agree with me, Dr. Pollay, that if somebody was to look at that and see that the heading of a presentation that you were about to deliver: "Getting Away With Murder!" that a person looking at that

25

objectively would think that you had a very specific

view about the tobacco industry and it would not be a favorable view?

A- Well, the subtitle says: "Cigarette Advertising and Public Policy." I would hope that the view would be that I do have a specific view toward the way in which cigarette advertising has or has not been regulated in the States.

Q- Why did you feel that it was necessary to emblazon in large black block the heading: "Getting Away With Murder!"

A- Well, all advertising needs a headline.

Q- And how many responses did you have to your promotion?

A- Well, I've had maybe a half dozen inquiries, but my schedule hasn't permitted attendance at any now, except Penn State University, the Donald W. Davis Lecture I mentioned, and I'll be going, on the first of May, to Harvard, to a Marketing Ethics Colloquium there.

Q- Dr. Pollay, I'd like to now put some general statements to you.

THE COURT:

Are you giving this a number?

Me BARNES:

I'm sorry, I'd like to give it a number.

THE COURT:

And do you want to file the original of the postcard?

Me BARNES:

Yes, the original, please.

BY THE CLERK:

ITL-40.

5 Me BARNES:

Q- Well, I suppose just for the record, in case anybody raised the question, can you just explain to us what the handwritten comment is on the exhibit, Dr. Pollay:

"Thanks for your help with A.C.R., Rick."

10 I take it that's your writing?

A- That's correct. Well, I actually had to have some clerical assistance, so the signature is mine, and the sentiment is mine although someone else wrote the "Thanks for your help" in order to process the many cards we had.

15 Professor Ringgold helped in the reviewing process, reviewed a couple of manuscripts of the -- I believe we had over four hundred (400) manuscripts to review and we sent her two (2) or three (3) and asked for her assistance, and this is my thanks for that effort on her part because there's no other compensation for that.

20 Q- Dr. Pollay, I'd like to -- it was ITL-40, I believe.

THE COURT:

Yes.

25

Me BARNES:

Q- Some general statements to you and just make sure that
-- that you still agree with them today, and I take from
an article that you wrote, which is known fondly as the
Padded Sell and...

THE COURT:

Do I get a copy?

Me BARNES:

Sorry, My Lord, one more. The most important person.

Q- Now, Dr. Pollay, for the past two (2) or three (3) days
you've been talking about some specifics of advertising,
and I just want to go back to some -- some basic
understandings and make sure that -- that I understand
what your position on advertising is from a general
perspective and I just want to read to you what you've
written and -- and I usually wouldn't give you the
article but I've given you the article so Mr. Baker
doesn't get up and -- so we've got it, because I'm only
asking you whether you wrote this and whether you still
agree with it today? There's nothing sinister in what
I'm suggesting to you at this moment.

THE COURT:

Could you just situate the article?

Me BARNES:

Yes, I'm going to read to him...

THE COURT:

It's probably from a book?

Me BARNES:

This is an article, I believe, and perhaps Dr. Pollay
5 can tell us when and when -- when and where it was
published?

A- Yes, it was a commissioned piece. That is, the editors
of the -- the academic journal requested it of me. The
journal is called Current Issues and Research in
10 Advertising, which is an annual production, and I think
the title describes it. In this particular year, it was
published in two (2) volumes, volume 1 being the
original empirical research and volume 2 being the
solicited reviews -- and I don't recall, but I believe
15 there were only a few reviews that year. In fact, yes,
there were only two (2). So this is essentially half of
that review volume. The other article was on magazine
audience measurement.

THE COURT:

20 And do you have the date?

A- Published in nineteen eighty-six (1986) -- at least,
that's the date on the manuscript. I believe it
actually came out in the spring of eighty-seven ('87)
but its -- its target was December eighty-six ('86).

25 Q- Okay, sorry, Mr. Barnes.

Me BARNES:

Thank you, My Lord.

Q- Now, I just want to read to you from a couple of places
in this article. First of all, at page one hundred and
5 eighty (180). Do you have that Dr. Pollay?

A- Yes, I do.

Q- All right, I just want you to read -- or I'll just read
it to you:

"Everyone, from the most naive consumer to the
10 most sophisticated practitioner, is acutely
aware of the obvious specific intent of
advertising to sell goods, to move the
merchandise. Even though many contemporary
ads are quite indirect and not transparent on
15 this score, it is impossible to grow up in a
commercial culture and not learn at an early
age about the self-serving intent of
commercial communication."

Now, do you continue to agree with that statement today,
20 Dr. Pollay?

A- Yes, but as the paragraph suggests, despite that there
is -- you see, most commentators suggest with some
certainty that advertising plays a far more profound
role in our society than merely accelerating economic
25 activity.

Q- I didn't suggest to you that it didn't. I'm just asking you if you agree with that statement today?

A- Well, yes, I've already agreed that people do grow up and ultimately become aware of the intent and become
5 cynical about advertising but that does not imply that they are therefore immune from it.

Q- I didn't suggest that, did I, Dr. Pollay. I'm not suggesting that they're immune from it. I'm suggesting to you that that statement is current today, and you've
10 agreed with that, and that statement also says that they become aware of this attitude towards advertising at an early age, do you agree with that?

A- Yes.

Q- And what would you say, Dr. Pollay, that age would be?

A- Well, it depends on the kind of awareness you're talking
15 about, but certainly by the teen years.

Q- By the early teen years?

A- Yes, it depends on the awareness. I mean, children at a younger age, even by the time they enter school, will
20 begin to be able to recognize television commercials as distinct from program contents.

Q- And they can start to recognize commercials that they have an interest in as opposed to commercials that they have no interest in?

A- Well, I guess they recognize that. I mean, they will
25

have interest in some and they will have less interest in others.

Q- All right. And you go on to say, on page two hundred and five (205), the last paragraph on page two hundred and five (205):

"The idea that advertising is not an omnipotent master and the consumer is not a helpless puppet is clearly valid."

And is that statement still true today? Do you need to read the rest of the article to find out whether that statement is...

A- No, no, I'm just reading what precedes and follows it.

Q- The statement is pretty basic, do you agree with it today or not?

A- Yes, I do, but the context in which it's presented is quite clear. It carries on to say that -- in the very next line, that:

"The position of advertising as impotent should not be overstated either. Clearly the professional community speaks out of both side of its mouth on this issue. Claiming impotence when challenged with criticisms and potency when selling themselves to clients."

And then that carries on to talk about the importance of it and...

Q- But the thesis here, Dr. Pollay, surely, is that -- that there's no guarantee that advertising will work, do you agree with that?

A- That's -- that's -- I definitely do. I think it's...

5 Q- All right.

A- ...still somewhat of an art form, carefully guided by research, but in the final analysis there is a creative element that plays a part.

10 Q- That's right, I think you go on to say that in your article. You say that:

"Even with sophisticated research, the creation of successful ads has many elements that belie total predictability and control."

15 A- That's right. All the research can do is improve the probabilities of success. It can't guarantee success.

Q- It can't guarantee success. And people, basically, cannot be made by advertising to behave against their will, can they?

20 A- Well, that's a difficult question. The advertising does shape attitudes and perceptions so that people's choices will, in the long run, because they're governed by these attitudes and perceptions, be influenced. They may still be acting as agents of freewill, choosing among the alternatives as they perceive them, but those
25 perceptions have been shaped in part by advertising.

Q- They may have been shaped in part but they can't be made to behave? If I don't want to smoke, an advertisement cannot make me start smoking, can it, Dr. Pollay?

A- It -- again, on the question of people's decisions, if
5 you say people have made a careful and competent decision and there's a commitment to it, clearly people cannot be bullied by a single ad, but a campaign over time will influence perceptions of both the behaviour in general and brands in specific that may colour their
10 decisions in future years and their reevaluation of their options.

Q- Do you think the sale of tobacco products should be banned?

A- No, I've never proposed that.

15 Q- Do you think that the advertising of cigarette products should be banned?

A- I think that's a judgement really for the Court to -- to weigh, and I think that's the purpose of this procedure here. My evaluation -- I've shared some of it. I don't
20 see that a great deal of the potential informative role of advertising would be lost in the face of such a ban.

Q- Well, is it your opinion that it should be banned?

A- I would say, given the current character of the advertising and the assessment of -- that informational
25 role has lost -- yes, I would say -- see no cost to

that, but I'm only, you know, looking at that side of the equation. I'm not the medical expert or the legal expert to assess the other considerations.

Q- Is that answer, then, yes, it should be banned?

5 A- Given the considerations -- given my understanding of the health consequences and my understanding of the role of advertising, in my view of the informative contents or lack thereof of advertising, yes, I see no serious reason why it should not be banned. As I say, there may
10 be other considerations that I have not reflected upon and that, I think, is the process -- purpose of the Court to add those.

Q- Now, when did you -- you come to that -- that conclusion, when did you come to that opinion, that it
15 should be banned?

A- Well, I would say it's still an opinion that's being shaped. I think the -- my attitude was certainly strengthened by the experience of reading all these corporate documents, so it's only quite recently that
20 I've had that opinion.

Q- Because, in fact, Dr. Pollay, and I'll turn it up if necessary, you were asked that question during the course of the Cipollone trial and you indicated, at that time, that you didn't have any opinion on whether or not
25 it should be banned?

A- As I say, it's -- my opinion has evolved through the experience of -- of seeing these corporate documents and further reflection on it and considerable research. I mean, that was at least a couple of years ago, and my attention has been given quite substantially to the cigarette issue since then.

Q- And I suspect that also the fact that you're working for the government has helped crystallize what opinion, if any, you would hold on that subject, wouldn't that be fair?

A- Well, not -- I don't think so, because I read the documents on my own and came to my own conclusion about the character of their documents. I mean, what -- I guess what crystallized my opinion was the extent to which I saw in the documents the -- the efforts to address the concerned smoker and to convince them to continue smoking rather than quitting.

Q- But that, Dr. Pollay, then becomes a subjective judgment by you of those documents as to what the purpose and intent of documents were; would that not be correct?

A- I don't think so. I mean, I cite the documents in support of that. I mean, I think that is made quite clear in many of the documents.

Q- Well, we -- we have spent a lot of time with -- with the documents over the past two (2) or three (3) days and I

suggest to you, Dr. Pollay, that -- that you do cite from the documents but you don't necessarily cite the full context of the documents?

A- Well, I didn't want to produce a report that was sixteen
5 (16) boxes large.

Q- But I think that's -- the thing that I find curious is that I don't see that you ever report anything that would be characterized as not consistent with your opinion when you reference any of the documents? For
10 example, as was pointed out to you, you don't indicate that RJR was talking only to smokers anywhere in this report, do you?

A- No, I don't. There are many things missing from the report, I think. I mean one could make lots of
15 observations about what's not in the documents.

Q- Now, you said, I think, a statement in response to an earlier question of mine that -- and I don't want to quote you out of context -- but dealing with the power of advertising to shape the values of the consumer, I
20 think, when you were responding to a question as to whether an advertisement could make me start to smoke. And would it be fair to say, Dr. Pollay, that there's quite a recognized controversy as to whether advertising appears to mirror or reflect society's values rather
25 than whether, in fact, it molds or shapes society's

values?

A- This is a large question on the largest of those sort of cultural impact questions, but there's no question about advertising's ability to shape attitudes and perceptions. That's a commonplace in advertising practice and theory in both the academic and professional communities.

Q- But, I mean, to turn up one of your own references, and this was something that you wrote in a document called: "Images of Ourselves, Good Life in the 20th Century Advertising."

A- Yes, I was the second author on that with Professor Belk, who was president of the Association of Consumer Research.

Q- And just the note that I have as to what you said about this debate...

Me BAKER:

Could you show him the document, please.

Me BARNES:

Q- Let me show you my copy of it, because I can't turn up the other copies. That's the article: "Images of Ourselves, The Good Life in the 20th Century"?

A- M'hm.

Q- All right. If we could just turn to page eight hundred and eighty-eight (888) together. What I really just

want to read to you is this...

THE COURT:

Page what?

Me BARNES:

5 Eight hundred and eighty-eight (888), My Lord.

Q- ...is: "Advertising and Lifestyle, Cause or Effect."

That's the heading on the page, My Lord.

"Advertising's critics have generally held
that advertising shapes our way of life."

10 And then you cite Berger et al and Peterson.

"While advertising's defenders argue that
advertising merely echoes existing patterns,
e.g. Brown and Peterson, others have concluded
that advertising both molds and reflects
15 life."

And you cite Kuhns and Williamson. Then you go on to
say:

"This is a significant, but largely
unresolvable debate."

20 That's what you wrote, Dr. Pollay.

A- Yes.

Q- All right. And my point to you is...

Me BAKER:

25 Leave the document there, please, Mr. Barnes, for a
moment, if you're going to put a question on it.

Me BARNES:

No, not on the document. I'm not going to put a question on the document.

Q- I'm just going to put to you that the unresolvable
5 debate continues today, with authors continuing to write on both sides of the proposition. Is that not correct, Dr. Pollay?

Me BAKER:

10 My Lord, before the witness answers the question, let him continue to have the passage that was just referred to on the table in front of him. That's the fair way to do it.

THE COURT:

That's not the question. Proceed.

15 A- Yes, in fact, it is exactly that debate that is summarized in the article on the quality of life in the "Padded Sell." The subtitle of that is: Common criticisms of advertising's cultural character and international public policies. The first, roughly,
20 two-thirds of the report is the summation of that debate, and I've written elsewhere on that same debate -- and invited debate. I mean, invited other people to take an opposing point of view in order to flesh out the argument.

25

Me BARNES:

Q- Now, in dealing with that, Dr. Pollay, you've done a history of the -- of cigarette advertising, and we spent a little bit of time on that. And I guess that your thesis, if I understand it, is that advertising had a great deal to do with the development of the cigarette market -- and certainly in the United States, where I understand the bulk of your research took place.

A- Yes. That advertising played a significant role in the growth of that market.

Q- All right. Now...

A- I'm a little confused as to the context. I don't understand the bridge between that observation and this discussion.

Q- Well, as long as you can answer the question, then you don't really need to understand the bridge. And since you're able to understand the question, I think that'll suffice.

Have you done any research to determine what, if any, other factors affected the expansion of the cigarette market, let's say from the years nineteen twenty (1920) to nineteen forty (1940).

A- Yes. Well, we've discussed this at some length with Mr. Irving. There clearly are a number of other events that historians would call historical preconditions, that is

that help create the opportunities for various products like cigarettes to become successful.

Q- Have you done any specific research yourself?

A- No, I have not.

5 Q- And why is that?

A- Because it was quite a substantial effort just to gather all the information on cigarette advertising, as reflected in the chronological notes. And I took the contemporary commentators' assessments that advertising was a significant factor as my evidence that it was.

10

Q- Right. Now, what other factors would you say would be important that you've not looked at or researched?

A- Well, again, we've discussed this already. It would be factors like the liberation of women, the break-up of extended families, perhaps, the movement of people into urban centers where the advertising would be more intense and all those phenomenon that would be going on concurrently.

15

Q- If we can just digress for a moment, when you were giving your evidence about women, Dr. Pollay, you indicated, I believe, that -- after a question to Mr. Irving -- that sometime around nineteen forty (1940), according to your history or your chronology, that the statistic for women smoking in nineteen forty (1940) was about twenty-six percent (26%), and that was taken from

20

25

your chronology.

A- Yes. I haven't confirmed that by being shown in a document, but I'm willing to accept your word on that.

Q- All right. And when would you say that the first
5 advertisement was specifically targeted towards the female in the United States?

A- Well, the campaign that evoked the first commentary, sort of got evidenced in the historical record, was a Chesterfield campaign in nineteen twenty-six (1926).
10 There were women featured in some preceding ads for minor brands, but they were judged to be more of the pin-up character design, really, to attract a male audience. Whereas the new campaigns in the twenties (20s) seemed, by public perception, to be aimed at
15 soliciting women.

Q- So that if we take, as the benchmark, nineteen twenty-six (1926) as being a specific ad campaign that targeted at women, I'd just like to show to you an article that goes back a long time, called: "Why
20 Cigarette Makers Don't Advertise to Women," by Lin Bonner, and that was published in advertising and selling in October of nineteen twenty-six (1926).

Have you seen that before?

A- No, I have not. But I have seen the Chesterfield ad
25 that they reproduce and that's the ad that's commonly

held as the hallmark beginning of the explicit
advertising towards women and was subject to a
substantial controversy because of that.

Q- All right. But the point that I just want to draw to
5 your attention from this article, Dr. Pollay, if we can
just look at the -- the -- really the second full
paragraph on that page:

"Approximately 3.4 ..."

-- well, let's do it this way:

10 "3,400,000 miles of cigarettes were smoked in
the United States during the 12 months that
ended with June 30th, 1926. Women inhaled
about 510,000 of these miles, or about 15% of
all cigarette tobacco puffed away in the
15 period."

Did you see that?

A- M'hm.

Q- Now, Dr. Pollay, that would mean that before the first
ad...

20 Me BAKER:

I object, My Lord. That is improper. He has not
identified through this witness that the witness
recognizes Lin Bonner as authoritative. He certainly
has said he's never seen the article. So he's now
25 testifying indirectly what he obviously can't do

directly with this witness.

Me BARNES:

Well, I think I...

Me BAKER:

He can't do it this way.

Me BARNES:

I don't agree with that at all. I said that -- to the witness, My Lord: if that is correct. That's how I started the question.

10 THE COURT:

Oh, I didn't hear the "Is that correct".

Me BARNES:

I'm sorry, I said "If that is correct".

THE COURT:

15 Oh.

Me BARNES:

We can play that back, but I think I said that, My Lord.

THE COURT:

Now you say it, anyway.

20 Me BARNES:

All right. I think I did, My Lord.

Q- If that is correct, Dr. Pollay, then at the time that the first advertisement was directed towards females in nineteen twenty-six (1926), fifteen percent (15%) of all cigarettes smoked were being smoked by women already.

25

A- Yes, that's what this article says. I don't -- again I don't know Lin Bonner, but...

Q- Do you have any information yourself, in nineteen
20 twenty-six (1926), in your history about the percentage
5 of women smoking?

A- No, I have what I cite in my -- my report in the historical chronological notes.

Q- When you were doing your chronology, would you have
looked at this type of document, the advertising and
10 selling journals?

A- Yes, but I did not come across reference to this, so I missed this article.

Q- And you don't have any reason to doubt the accuracy of that figure?

15 A- Well, in -- no, I would assume it to be at least a rough estimate. I mean, it may well be rounded off, as sometimes is the case in these journalistic treatments, but I assume it's a rough measure of the magnitude.

Q- So that what we know then, Doctor, if it's a rough
20 estimate -- but let's agree that it's an approximation -- that there were a substantial number of people -- pardon me, a substantial number of females that had started smoking cigarettes...

THE COURT:

25 The way you said it just doesn't sound right.

Me BARNES:

I missed that point.

THE COURT:

I know you did. I know you did.

5 Me BAKER:

We won't allow the record to know who made that last
comment.

THE COURT:

You wanted to say of female persons.

10 Me BARNES:

Oh, sorry about that.

THE COURT:

I assume.

Me BAKER:

15 We all get into that kind of trouble from time to time,
Mr. Barnes.

Me BARNES:

I apologize to the females in this room.

20 Q- Dr. Pollay, if we can agree, then, that the figures are
an approximation, but fifteen percent (15%) of the
cigarettes inhaled by females -- or fifteen percent
(15%) of the cigarettes that were inhaled were inhaled
by females before any advertising campaign specifically
targeted females. Would you agree with that?

25 A- Yes, that seems to be the case.

Q- All right. And then after females are targeted -- and that commences in nineteen twenty-six (1926) -- if we take your figure that from nineteen twenty-six (1926) and to nineteen forty (1940), I believe, was your figure, it goes up to twenty-six percent (26%)? That would be correct?

A- Yes, that seems to be correct.

Q- So what we can conclude from this is, at least up until nineteen forty (1940), a great majority of women decided to smoke before any advertisements were targeted to them.

A- Yes, that's correct.

Q- Now, in your paper, Dr. Pollay, you refer to an author known as Calfee -- Calfee, is that correct? I wonder if we can get your attention.

A- Yes, I was just trying to finish my digestion of this previous result to see what it concluded. This article by Lin Bonner actually concludes that smart advertising writers and artists for some time past have been getting their messages across to the women, and in one of the most adroit campaigns I have ever noted. Pick up any magazine or newspaper or look around you at the cigarette advertisements on the billboards and, almost without fail, you'll find a woman somewhere in the picture.

One recently showed a hand, undoubtedly feminine, holding a cigarette; another has a girl asking her boyfriend to blow the smoke in her direction, which is the one we've produced. These are all linking up the women and the cigarette, yet none of them offer her a package for sale. So they're not yet explicit in their violating social norms by offering it to women, but they have been, as this author suggests, adroitly getting their message across to women nonetheless.

10 Q- But the point is that the target was not the women, and you've agreed with that.

A- Well, that's not the writer's conclusion. The writer's conclusion is they have been getting their message across to women. What the ads have not been doing is being as explicit. That's more -- it sounds more covert in her analysis. I judge that's what she means by adroit. I just didn't want to take that out of context.

20 In any event, the poster is captioned -- this poster makes an indirect appeal to the feminine market. Although to date it constitutes the most direct appeal in this direction which we have on record, they become more and more explicit as time goes on, because as the larger number of women in the population are smokers, it becomes a little easier to -- to use women without it being so scandalous.

Q- But I think if you read the article in its entirety, Dr. Pollay, that you can draw from this article, where we started, that this author starts that -- from the proposition that these fifteen million (15,000,000) started smo... or fifteen percent (15%) did it of their own volition. The cigarette makers do not advertise for the woman's trade. Then they go on to explain why.

A- Well, the context here is that they're avoiding explicit advertising out of fear of provoking legislative reaction. The second page talks about the possibility of a bill being introduced in the legislature to prohibit the manufacture or sale of cigarettes. That is, they didn't want to violate social norms and provoke a reaction. So, I mean, there obviously has to be some sensitivity to the cultural norms in the conduct of an advertising campaign.

Q- Dr. Pollay, we were coming around to find out who John Calfee was.

A- Yes, John Calfee is an economist who at one time worked for the Federal Trade Commission and is now a professor in Maryland, I believe.

Q- And you've quoted from him in your paper at least twice, if not possibly three (3) times, but I recall twice. Is that not correct?

A- Yes. He did -- he documents the tar wars. I don't

remember how many. There's only one (1) piece that's cited. It goes to cigarette advertising past, which is a documentation of the tar wars. He's also written on the compensation behaviours of smokers, that is their tendency when they move to lighter tar and nicotine product to smoke more or smoke it faster or defeat the filter effectiveness in various ways in order to maintain their nicotine intake.

Q- And are you aware of what Dr. -- or is it Dr. Calfee?

A- Yes, I would assume so.

Q- Are you aware of what Dr. Calfee's view is on the restriction on advertising and its ability to reduce smoking?

A- Yes, I am.

Q- And is that found in the same article that's referenced in your report?

A- It may be. It's certainly found elsewhere. It's -- he's become more and more of an advocate in recent years.

Q- Let's just, if we can for a moment, confirm what Calfee article you were referring to in your report to see if they're the same.

A- The title is "The Ghost of Cigarette Advertising Past".

Q- Right. Now, My Lord, I intend to go into this article.

Is it appropriate to rise?

THE COURT:

Yes. We'll adjourn to two fifteen (14H15).

LUNCH ADJOURNMENT

5

In the year of Our Lord nineteen hundred and ninety (1990),
on this third (3rd) day of the month of April, PERSONALLY
CAME AND APPEARED:

5 Me THIBAudeau:

Pour la requérante, RJR, Colin Irving et Georges
Thibaudeau.

Me BARNES:

10 On behalf of Imperial Tobacco, Lyndon Barnes and Simon
Potter.

Me BAKER:

For the Attorney General, Roger Baker, Claude Joyal and
Lise Tremblay.

15 My Lord, may I ask you, before we commence this
afternoon, if we could meet with you in chambers at the
afternoon break very briefly?

In the year of Our Lord nineteen hundred and ninety (1990),
on this third (3rd) day of the month of April, PERSONALLY
CAME AND APPEARED:

5 RICHARD W. POLLAY,

WHO, being under the same oath, doth depose and say as
follows:

10 CROSS-EXAMINED BY Me LYNDON A.J. BARNES,

On behalf of Petitioner, Imperial Tobacco Limited:

Q- Now, Dr. Pollay, prior to the lunch break I was asking
you about John Calfee, and over the lunchtime break I
found a couple of references in your report to Calfee on
15 pages twenty-eight (28) -- pardon me, pages nine (9) and
ten (10). I see one in the middle of the first
paragraph on page nine (9), Calfee. Do you see that,
Doctor?

A- Yes, I do.

20 Q- And I see another one at the very top of page ten (10).

A- Just a minute, do I see -- yes.

Q- You see those two (2) references?

A- Yes, I do.

Q- And both those references are to an article that he
25 wrote on "The Ghost of Cigarette Advertising Past".

15/0090

A- Yes, that's the one I cite.

Q- And basically, what you're doing when you cite from a variety of authors or references here, is just citing a sentence or a fact that you believe is important for this particular part of the text, is that correct?

5

A- No, a citation like that serves the function of providing the reader with direction if they want to pursue the question of tar even further, because that's a more comprehensive discussion of the tar derbies.

10

Q- And you would also have to pursue the author's actual written word to determine whether the author believes that there was any merit in a ban on advertising as well, wouldn't you?

A- That's correct.

15

Q- And in fact, when one looks at this particular article that you've referenced, you find that Calfee doesn't believe that an advertising ban is going to have any impact on reducing the consumption of tobacco products, would that not be correct?

20

A- I suspect that is. I'd have to look at that specific article, but I know as a matter of consistency he belongs to the school of economists that are the deregulators. He's, I think, ideologically quite committed to abandonment of regulation.

25

Q- And he's an economist, is he?

A- Yes, he is.

Q- And he's on staff of the Federal Trade Commission?

A- He was. He's now teaching, I believe, at the University of Maryland. I believe he's teaching in a business school there actually, despite the fact that he doesn't have any training in business or advertising or consumer behaviour, but I think the Federal Trade Commission experience was sufficient to get him that posting.

Q- Just so that we can confirm what his view is, let me just give you a copy of this article that you've referred to and ask you just to look at the -- the last page, if I might. If I could ask you to look at the last paragraph on the last page of the article, which is page forty-five (45)?

"Regulators too may be or should be looking over their shoulders as specters from the past, wondering about their ability to improve the welfare of consumers by limiting the information and appeals that sellers direct their way. Those who would abolish the remaining conventional forms of cigarette advertising, print media and billboards, no doubt believe that a ban will be beneficial where partial restrictions were not and, of course, there is no way this belief can be

disproven, but the fact remains that successive restrictions on advertising have tended to undermine improvements in cigarettes while doing nothing to reduce smoking. We cannot assume that regulators today are more clever or farsighted than they were in 1950, '55, '60 and subsequently. The advertising banners, like the smokers they seek to help, are bucking the odds."

So would you agree with me that at least Calfee is of the view that a ban is not going to do anything to reduce consumption?

A- Yes. In the context in which Calfee works, he also -- his focus of attention is on the movement of consumption from full flavour to lighter tar, milder product. He's not really concerned with the movement in and out of the market. That is the quitting or starting rates.

Q- Whatever -- whatever his focus is, he certainly holds that view, that's what he stated in that article?

A- Yes, as I say, but that context is important. That is, it's the -- he's of the belief that in certain periods of history that information on the tar and nicotine content in those periods like the tar derbies when the periods were relatively unregulated, speeded the process by which smokers moved to lower tar, nicotine

cigarettes.

Q- That's right. And in fact, in his article, he even sees
the distinct advantage when you could have health scare
advertising as well as being a method of heightening the
5 awareness of the concerns about the use of tobacco,
doesn't he?

A- But that's the extent of the range of the policy
alternatives he's considering. He's not looking at
people abandoning smoking. He's just looking at the
10 switch, the down-scale switching.

Q- But you can put qualifications on -- on Calfee but
Calfee is pretty clear in what he says in the
conclusion, isn't he? If I was to read this, I would
read this as understanding that Calfee does not believe
15 that a restriction on advertising will reduce smoking.
Would I be incorrect in assuming that that's what his
opinion is?

A- Well, you would be absolutely correct. His opinion is
even more strongly stated in recent articles,
20 sufficiently so that I've been invited by editors to
author rebuttals, as has Professor Cohen.

Q- And people invite you, obviously, because you're an
advocate for the banners; would that not be a fair
statement, Dr. Pollay?

25 A- No, in this particular case, the article tried to defend

this ideological position using the content analysis of historical of cigarette ads and I was judged to have done the most work on content analysis and was asked to look at it from a methodological point of view and to validate the data against my awareness of the historical record -- and I've done so. That was -- has been published in the Journal of Public Policy and Marketing this past winter.

THE COURT:

Excuse my ignorance, what does that mean, bucking the odds?

Me BAKER:

Going against what's really happening.

Me BARNES:

Going against the...

Q- Thank you.

Me BAKER:

I didn't know it was directed to you.

THE COURT:

It was at large.

Me BARNES:

No, no, good.

Me BAKER:

It's sort of like if I kept objecting to something and you dismissed the objection ten (10) times, the eleventh

(11th) time -- by the eleventh (11th) time, I would be bucking the odds.

Me BARNES:

Maybe by the first.

5 Me BAKER:

You haven't got me ten (10) to zero (0) yet, Mr. Barnes. Don't try.

THE COURT:

No. So far so good on both sides.

10 Me BARNES:

Q- Dr. Pollay, could you turn to your report, please, on page twelve (12). Now, the paragraph -- the second paragraph on the page:

15 "Advertising of maximal effectiveness for the firms and industry would A) reinforce current smokers, inducing them to continue smoking rather than quit and/or B) attract starters." First of all, stopping there, Dr. Pollay, those are your words?

20 A- Yes.

Q- They're not taken from a report? Those are your words?

A- That's correct.

Q- And I guess that I'd like to focus on this word "inducing," because I find that word, quite frankly, Dr.
25 Pollay, to be rather paternalistic. Now, would you

agree with me, Dr. Pollay, that there are many people smoking who smoke because they enjoy it and they don't wish to quit?

A- Well, I'm not sure what you mean by many. The evidence I've seen suggests that they're the minority of smoking populations, that the majority feel conflicted and would like to quit, or at least forty-one percent (41%) I heard try to quit in any given year, and I've seen much larger estimates of those that are concerned about their smoking.

Q- But -- that's fine, but let's look at what your statement is here: reinforced current smokers inducing them to continue smoking. But even on your figures, there is a percentage of people that wish to continue smoking. They don't need to be induced to continue smoking, they make a conscious decision that they wish to smoke, don't they, Dr. Pollay?

A- Well, they may do that for a number of reasons. I mean, they may feel that the brand they smoke provides them with a badge of masculinity. The advertising, in that case, is necessary to -- to provide ego reinforcement. That is, to continue to -- to provide repetition for that imagery so that they are -- their social identity is reassured.

Q- Well, is it your objective here to see that people don't

smoke, Dr. Pollay?

A- No. I'm, in that paragraph, trying to describe what I would see the management perspective on -- on the optimal advertising.

5 Q- Well, let's step out from the paragraph for a moment. Do you agree with me that there are people, and a number of people, that choose to smoke, accepting whatever risks there are and wish to continue smoking?

A- Well, I certainly accept that there must be some people
10 who would fit that description.

Q- So that we're not, then, talking about, in this paragraph, an effort by the industry to induce all smokers -- or pardon me, to reinforce all current smokers to stay smoking? You'll agree with me at least
15 some current smokers wish, on their own volition to continue as smokers?

A- Perhaps, and I suppose that's their right as long as they're fully informed as to the consequences of the risk that they're assuming.

20 Q- And you'll have to agree with me that there are many people that are aware of those risks and still make the choice to continue smoking, won't you, Dr. Pollay?

A- No, the research I've done indicates that most people greatly underestimate the risks.

25 Q- And how much research have you done?

A- I've been collecting surveys of -- and I have now the data from over a thousand subjects, and fewer than one percent (1%) come within five percent (5%) of estimating the actual health consequences of smoking.

5 Q- But probably all of those respondents understand that there is some risk. We're talking about the degrees of risk?

A- Well, yes, but to make a considered decision one would need to know the degrees of risk. I mean,
10 underestimating the degrees of risk can lead to an egregious decision.

Q- But I mean, dealing with the question of risk again, it's the risk of how much. If, on the one hand, it's going to reduce your life expectancy, then surely the
15 next question is by how much?

A- And with what probability.

Q- And with what probability.

THE COURT:

I wonder if it's within the scope of experience of this
20 witness?

Me BARNES:

I think that we'll move on to another area, My Lord.
That's fine.

Q- Now, you talked about market segmentation, Dr. Pollay,
25 and I'd like to just deal with that for a moment. Do

you think that there's anything wrong, Dr. Pollay, with using this sort of market segmentation and the sophisticated applied technology that goes with it in terms of analyzing a market and developing an advertising campaign?

A- No. In general, the segmentation process allows the manufacturer to maximize sales by offering a more diverse product line and also in the process offering that diversity to the diverse population so that each consumer is more likely to get that which comes closest to their preferences.

Q- And in fact, it's really standard industry practice for a variety of consumer products, isn't it?

A- Yes.

Q- I just want to take you to your report for a moment again, and ask you to turn to page number sixteen (16). Pardon me. Page number nineteen (19), and your document one hundred and fifty-four (154). You see a reference to document one hundred and fifty-four (154) under youth target study, nineteen eighty-seven (1987).

A- Yes, I do.

Q- When you were giving evidence, I believe, to Mr. Baker, on Friday, you referenced Project Viking. Do you recall that, Dr. Pollay?

A- Yes, I do.

Q- Right. And did you, during the course of your preparation for your report and giving evidence, look at Project Viking as one of the many documents that you reviewed prior to giving evidence at this trial?

5 A- I saw it subsequent to the authoring of this report.

Q- All right. And what I'd like to show to you, Doctor, is first of all ask you to look at AG-215.

Me BAKER:

Just for reference, Mr. Barnes, that's the one that's
10 "Starting" -- entitled: "Starting?"

Me BARNES:

That's correct.

Q- And I would ask you also to now look at AG-21A, which is Project Viking, volume I.

15 THE COURT:

I'm sorry, what's the number?

Me BARNES:

AG-21A, My Lord.

Q- Do you have that, Dr. Pollay?

20 A- Yes, I do.

Q- And I suggest to you, Dr. Pollay, that if you now look at AG-21A you will find, in fact, that AG-215 is part of Project Viking, and I invite you to turn to page number ten (10). I guess it's page number nine (9). And I
25 suggest to you that if you compare that through to page

number thirty-four (34) -- or pardon me -- twenty-four (24), you will find that it comes from Project Viking.

A- Yes. So that page nineteen (19) should be identified as Project Viking, not as Youth Target Study, eighty-seven ('87).

Q- Right. And it's not part of the Youth Target Study?

A- No, I saw a reference to that -- I was guessing, because I had this document without a title and I had reference to the Youth Target Study eighty-seven ('87) and no document for that. And these were the two (2) mystery pieces and I just guessed that they might go together and I tried to display that I wasn't certain of that.

Q- But I mean it doesn't indicate to me in your report that it was a guess.

A- I said: "apparently from this study," but without a title page.

Q- I see.

Me BAKER:

My Lord -- excuse me, Mr. Barnes.

My Lord, in fairness to the witness.

THE COURT:

Yes.

Me BAKER:

It came out earlier in the trial that many documents of this nature, I'm now referring to AG-215, were given to

the Attorney General in the boxes in the form that I have it in my hand now. In other words, with no indication that it came from Viking. You may recall, we were only given the Viking documents by Imperial Tobacco well after the reports were in.

So for Mr. Barnes to suggest that there was something untoward in Mr. Pollay's use of the document in the form that he got it, which is the form in which we got it, is -- for me, beggars the imagination. I don't know why he's even suggesting that there's anything wrong.

Me BARNES:

I'm just exploring, Mr. Baker, with the witness, what he knew and what he read at the time.

THE COURT:

Well, where did he get -- where did you get the name Youth Target Study nineteen eighty-seven (1987)?

A- There was an ITL market research library list and it has a document number, I don't recall what it was, but there's a library list. And in that library list for the market research department it listed a number of studies, including one (1) of sort of four (4) volumes of Youth Target Study, eighty-seven ('87). And that was nowhere to be seen in the balance of the documents, so I knew it existed, but that's all I knew.

Me BARNES:

Q- So you knew a document existed, and a document that you hadn't seen, so you just made an assumption that these pages were from that document?

5 A- Mr. Barnes, I tried to be very careful in specifying exactly what I knew, that full documentation was missing, a partial document, apparently from the study, but without a title page to confirm that, and then I described what it does say. It presents a section
10 concerned with starting, and that, because it's concerned with starting, I assumed it might be a partial document from the Youth Target Study eighty-seven ('87). I made no attempt to misrepresent what I knew and didn't know.

15 Q- Well, in any event, the record's clear now that it's part of Project Viking, we're agreed on that, Dr. Pollay?

A- Yes.

Q- All right. And there's been a lot of evidence given in
20 this Court by other witnesses as to the -- as to Project Viking. Are you aware of what the purpose of Project Viking was?

A- I can't quote it verbatim but I remember that it's
25 assumed a couple of other projects, Project Pearl to expand the market and Project something or other. I

can't remember the details.

Q- I think that -- that the evidence that has been given was, in part, that it was to understand the market and see where the market was going as well. That was the evidence that I think came out?

A- But I recall -- yes, here in the foreword, it says on page -- I guess it's page one (1), anyway, it's where the foreword has a text. It says:

"This is the underpinning of project Viking.

There are, in fact, two (2) components to the program, each having its own purposes but also overlapping with the other informational areas."

-- the information here --

"Project Pearl was directed at expanding the market or at the very least forestalling its decline. It examines attitudes and issues with the potential to be addressed via advocacy. It also looks at the needs of smokers specifically. The other component is Project Day. It represents the tactical end by which ITL may achieve competitive gains within the market of today and in the future, unmet needs of smokers that could be satisfied by new and modified products, products which

could delay the quitting process are pursued"

So the two (2) prongs are to expand the market and delay the quitting process.

Q- Well, there's been a lot of other evidence given about
5 it -- and is that all you've read from the documents,
Dr. Pollay?

A- No. That's all I've read just now.

Q- So you have read the volumes?

A- No, I haven't read all the volumes. I've read the
10 executive summary, which is, you know, those ten (10)
pages of text and the tables here. Obviously I've
looked at this, sections nine (9) -- pages nine (9)
through twenty-four (24), and I've seen some other parts
of this.

Q- And the -- the thing that does come clear from looking
15 at that is that they're not just looking at youth,
they're looking at the whole market, aren't they?

A- Oh, yes, that's right. The sample population is quite
comprehensive, although there is a lot of focus on
20 starting -- the starting dynamics -- which is what I
report. This section here was about starting.

Q- Now, yesterday, Mr. Baker took you to the ITL Media Plan
for nineteen eighty (1980), and that was ITL-13, and
during the course of that evidence, you looked at a
25 couple of pages and you -- I believe you looked at page

twenty-seven (27)...

Me BAKER:

And nineteen (19).

Me BARNES:

5 What was it, Mr. Baker?

Me BAKER:

I think it was nineteen (19).

Me BARNES:

Was it nineteen (19)?

10 Q- Twenty-seven (27) and nineteen (19), and at some point
in time you drew to the Court's attention the target
groups being twelve (12) to twenty-four (24) and twelve
(12) to seventeen (17)?

A- Yes.

15 Q- And I made a note of your evidence and if there is any
issue on it we can turn it up, but that at one point in
answer to some question from Mr. Baker, you indicated
that it was -- this is my note, and I stand to be
corrected, that it was a managerial discretion as to the
20 age groupings. Do you recall saying that, Dr. Pollay?

A- That's correct; and as to the weighting...

THE COURT:

The weighting, yes.

A- ...as well as the priorities.

25

Me BARNES:

Q- As to the weighting, all right.

A- Yes, both.

Q- That is to both. Okay, now this information is, in
5 part, taken to conform to PMB Publications. Do you see
that, Doctor?

A- I don't have the document to see.

Q- I'm sorry. ITL-13, please.

Me BAKER:

10 Mine is yellowed up a bit, Mr. Barnes, you don't mind,
do you?

Me BARNES:

I'm sure he'll highlight the important parts, Mr. Baker.

Me BAKER:

15 Yes, well seventeen (17).

A- Yes, that's right. Under the media schedule it notes
that some of the media are covered by the PMB Print
Measurement Bureau data bases and some are not.

Me BARNES:

20 Q- Excuse me. Now, I suggest to you that when you're
focusing on the target groups, being twelve (12) to
seventeen (17) and twelve (12) to twenty-four (24), that
those age groups have not been selected as a matter of
managerial discretion but they've been, in fact,
25 selected as a result that they are PMB measurements and

they could not be changed in nineteen seventy-nine (1979). Were you aware of that?

5 A- Well, what I meant by -- what I meant by selected is that one can choose which of these constitute the target group, how specific to make that. That is, you could specify it twelve (12) to sixty (60) or twelve (12) to seventeen (17) or twelve (12) to twenty-four (24).

10 So the amount of precision you provide is up to you and then, of course, the weighting you attach to each of those identified groups is up to you.

15 Q- But in terms of looking at age breaks for magazines, Imperial Tobacco was governed by what data they can buy from PMB and, in nineteen seventy-nine (1979), their evidence was that they had to take it in certain forms, and when they asked to have it differently, they were told that that was not possible in nineteen seventy-nine (1979)?

20 A- You mean that they were not -- I'm not -- I mean, you seem to have made a statement. I'm not sure there's a question.

25 Q- Well, I'm just trying to -- you're trying to suggest here, Dr. Pollay, I'm sure, that there's something sinister about the target group being twelve (12) to seventeen (17) and then twelve (12) to twenty-four (24) in terms that some manager at Imperial sat there and

said "all right, we'll write in twelve (12) and then we'll write in seventeen (17)" -- and I'm suggesting to you that's not, in fact, what happened at all.

A- I'm not suggesting it's sinister. I'm just suggesting its intentional that, I mean, the choice to specify it with that precision and to assign a weight is not mandated. No one says that you must assign that weight to that group or that you must advertise to that group.

Q- And you have no information then, I take it today, as to the -- the preset computer age breaks that PMB was using in nineteen seventy-nine (1979)?

A- No, I do not.

Q- Now, you were talking yesterday, Dr. Pollay, or perhaps on Friday, about imagery, and do I understand your evidence to be that there's very little information contained in the advertisements? In fact, I think you said that they were more transformational rather than informational?

A- Yes, that dichotomy, transformational/informational and along that spectrum, I would say yes, that the lifestyle advertising is more transformational than informational.

Q- All right, and let's just look at the product that -- that we were dealing with prior to the ban in nineteen eighty-nine (1989). Would you agree with me that basically we had product parity, I mean the product from

manufacturer to manufacturer was very similar. The packaging in terms of the type of packaging was very similar. The distribution was very similar. Most brands were available everywhere?

5 Me BAKER:

I object to the question, My Lord. I don't know that it's been established that Dr. Pollay knows if the products between manufacturer and manufacturer were similar. He's certainly not established any expertise in that connection and it's not come from his mouth.

10

Me BARNES:

Well, all right, let me -- let me rephrase it.

Q- They look alike. I'm sorry.

THE COURT:

15 Are you going to rephrase or?

Me BARNES:

I'll rephrase it.

Q- I mean, the products look alike?

A- I don't open the packages so I don't know about what differences there might be in filter, design and coloration.

20

Q- You used to be a smoker, didn't you, Dr. Pollay?

A- Yes.

Q- So we don't really need to be cute. You used to open packages, didn't you?

25

A- I'm not trying to be cute, I'm saying that I'm not aware of the differences in filter designs in contemporary Canadian cigarettes.

Q- Are you aware of differences in packaging?

5 A- Yes.

Q- What are the differences in packaging?

A- Different sizes of packages, flat packs, different sizes of products, long and thin products. Some packs of twenty (20) and some packs of twenty-five (25). Some
10 packs of fifteen (15).

Q- And that sort of information would be contained on the package, would it not?

A- On the package, yes.

Q- Right. And you would agree with me that the product,
15 for the most part, does price parity?

A- I would guess there probably is a limited range of pricing. Again, because I'm not shopping the product, I don't know the extent of that range.

Q- But it wouldn't come as a surprise that, in order to try
20 and distinguish between brands, the manufacturers are trying to distinguish by way of creating different images?

A- Well, I don't see that that necessarily follows. I mean, while I agree that this industry is like other
25 industries where products have a high degree of

similarity, it doesn't preclude the advertising from focusing on those things that do distinguish individual products. There might be a lot of information provided about the kind of tobaccos, how it's sourced, the nature of the filter and how it's designed, the design of the -- the product, quality control in the manufacture, perhaps pricing if they wanted to be price competitive, deals and premiums, and there's all kinds of potential information.

10 Q- Let's look -- could we have ITL-23, please? Now, ITL-23 is an advertisement for Medallion. Do you have that in front of you, Dr. Pollay?

A- Yes, I do.

15 Q- And I suggest to you that in this example there was something that clearly distinguished this particular cigarette from others and they were able to say that in the advertisement. They were able to say that there's nothing milder because, in fact, it was the mildest. So that in this particular campaign they were able to make that statement and convey that information.

20

A- Mildest meaning what: lowest in tar?

Q- In nicotine levels.

A- They don't say that.

25 Q- No, that's right. They have to be very careful about what they say, don't they, Dr. Pollay?

A- Well, they are very careful. I don't know. Yes, they have to be very careful.

Q- Right. So to the extent that there is a differentiation between this product and the others, that's conveyed in this particular series of advertisements; is that not correct?

A- Yes. There's a claim made that -- or it's asserted that this is the mildest cigarette available, and presumably directed at concerned smokers who are trying to reduce their intake of tar and nicotine.

Q- And what information, Dr. Pollay, do you think that they should be putting in their advertisements that they're not prior to the ban?

A- Well, as I say, there's quite a variety of information that might be included. Tar and nicotine information for one, health consequences for another, they could talk about the qualities of the tobacco, the qualities of the filter, the qualities of the smoke, distribution, pricing, packaging considerations.

Q- Well, distribution. Let's focus on that. What would they say about distribution?

A- They could call attention to its availability.

Q- Do you see that in an ad for toothpaste? Do you see distribution network in a toothpaste ad?

A- Yes, sometimes.

Q- How frequently, Dr. Pollay?

A- I can't answer that with any precision, but there's often...

5 Q- I bet you can't recall one in recent years, can you, where they tell you to go and buy toothpaste.

A- Sure. A new product like toothpaste might well be promoted: "available soon at your drugstore," or "available soon at your supermarket."

10 Q- Available soon would be the important factor, wouldn't it?

A- Or it could be now available or...

15 Q- Well, what I'm suggesting to you, Dr. Pollay, is that the creation of an image by a manufacturer for its product is one way that they're able to communicate a difference between brands. Would you agree with that?

20 A- Well, it's not clear what the difference is between the brands, except by that which is said about the -- in the lifestyle advertisements. That is, you're asserting, as I understand it, that the brands are not different, but that the advertising works to induce differences in perceptions. Is that correct?

Q- There's a perception about an image that goes with the brand, yes.

25 A- Well, I guess I would agree that that's a possibility, that products can be identical and yet be led --

advertising can lead consumers to perceive them as different, even when that's a specious perception.

Q- Throughout your report, Dr. Pollay, you used the word: "starters." Do you agree with that, Dr. Pollay?

5 A- Yes. I used that word.

Q- And are you using that word: "starters," in the same way that the industry uses that way -- pardon me -- that word: "starters?"

A- I don't know that. I suspect for some of their data
10 bases they have to be quite precise in their definition of what constitutes a starter and are probably -- I know they distinguish between experimenters and starters, so there must be a certain rate of smoking at which they reclassify a new smoker as going from an experimenter to
15 a starter.

Q- But it is important to know though, Dr. Pollay, what you mean by the word starters, because if you're lifting the word starters from a company document, it may in fact have a different meaning than the word starters to you,
20 isn't that true?

A- I suppose it might.

Q- Well, for example, the evidence from Imperial on their definition of starter -- and I'll just read to you what was said by Mr. Brown some time ago, some months ago,
25 and this is at Volume VI, at page seven hundred and

forty (740). And I'm just going to read to you what he said about a starter:

"A starter is defined as a person, a smoker, who when interviewed, gives his brand. And that's from the CMA, a telephone interview. And as we described last week, the switching information we get comes from when we ask a person how long they smoked that brand and what was their previous brand. If the smoker gives his brand and one asks what his previous brand was, he says: "I did not smoke," then he was defined as a starter or a new smoker."

So that when Imperial uses the term "starter" in its documents it means somebody that is a smoker...

15 Me BAKER:

That's not a document, that's testimony, My Lord.

THE COURT:

Anyways, you've made your point. He said that, yes, it may vary, depending on what the industry understands by the word starter.

Me BARNES:

But what I want to know from Dr. Pollay is what he means by the word starter when he uses it in his report.

Me BAKER:

25 | Where in the report?

Me BARNES:

Well, let's first of all find out.

Q- Are you using the word starter differently in various parts of your report?

5 Me BAKER:

My Lord, let him draw the witness' attention to the use of the word in the report. This is a guessing...

THE COURT:

Well, the word is used throughout the report, but it's
10 used in citations that are taken from company documents.
I mean -- and we've dealt with that yesterday as well.

Me BARNES:

Well, I just wanted to make sure that we had a definition of starter on the record and find out if Dr.
15 Pollay was using that or not.

THE COURT:

Well, he didn't know what the industry meant by that.
So...

Me BARNES:

20 That's right.

THE COURT:

...we'll have to go to other testimony or other evidence to determine what is contained in those company documents and determine what the meaning of the word is.
25

Me BARNES:

Q- Now, Dr. Pollay, the -- I think you gave some evidence
yesterday that -- when you came back in, just as you
started the evidence yesterday morning -- you indicated
5 that the development of a brand advertising campaign
could take a long time, perhaps upwards of a year by the
time that they had done focus group work and evaluation
work and things like that. Would that be correct?

A- Yes. And the decision to abandon an ongoing campaign
10 might also take additional time.

Q- That's right. And if, in fact, as you suggest, that
part of the target market was to be the non-smoking
population, wouldn't it be prudent for the industry,
when they're doing development work for a brand
15 advertising campaign, to do focus group work with
non-smokers to evaluate the potential success of an
advertising campaign?

A- It would be a very prudent thing for managerial
purposes. It would be a very imprudent thing for legal
20 reasons.

Q- Why do you say it would be an imprudent thing for legal
reasons?

A- Well, I think it would be quite embarrassing to have it
known that they were researching non-smokers that
25 explicitly.

Q- Well, would you agree with me, Dr. Pollay, that in all of the Imperial documents that you looked at dealing with the development of a brand advertising campaign, you were -- you did not find any work that was done with non-smokers? I'm talking about the development of a brand advertising campaign.

THE COURT:

We went through that yesterday as well.

Me BARNES:

We went through that, My Lord, I think, for RJR. I may stand to be corrected.

THE COURT:

Oh, you're asking him in ITL documentation?

Me BARNES:

Yes. I'm sorry, My Lord...

THE COURT:

Okay.

Me BARNES:

...but I don't think Mr. Irving was broader than that.

THE COURT:

No. You're right.

Me BARNES:

Q- I'm dealing with the advertising campaign documents, Doctor.

A- Yes. Yes, that would be my understanding. I would

agree with that.

Q- Thank you very much, Dr. Pollay.

THE COURT:

Any questions in re-examination?

5 Me BAKER:

There are two (2) issues, My Lord. As I said earlier, I sought your permission to meet with you in chambers at the afternoon break. Before re-examining Dr. Pollay, I seek your permission to communicate with him for five
10 (5) or ten (10) minutes before I commence the re-examination, which I would not do without your permission.

THE COURT:

Okay. We'll take the break now, if you want to come
15 down to my office.

Me BAKER:

Thank you, My Lord.

SHORT RECESS

20

Me BAKER:

Thank you for your indulgence, My Lord. I have decided not to ask Dr. Pollay any questions in re-examination.

THE COURT:

25 Thank you. Thank you, Doctor -- can we free the

I, the undersigned, DIANE LAMBERT, recording monitor, swear that I have personally conducted the recording of the preceding evidence and representations, verifying continually the quality of said recording, that I have prepared minutes of this hearing with due attention and that in no case was the equipment used defective.

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I, the undersigned, JANE WEAVER, proof reader, swear that the preceding pages are and contain the faithful and accurate transcription of the English recording.

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